TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 765. 265

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

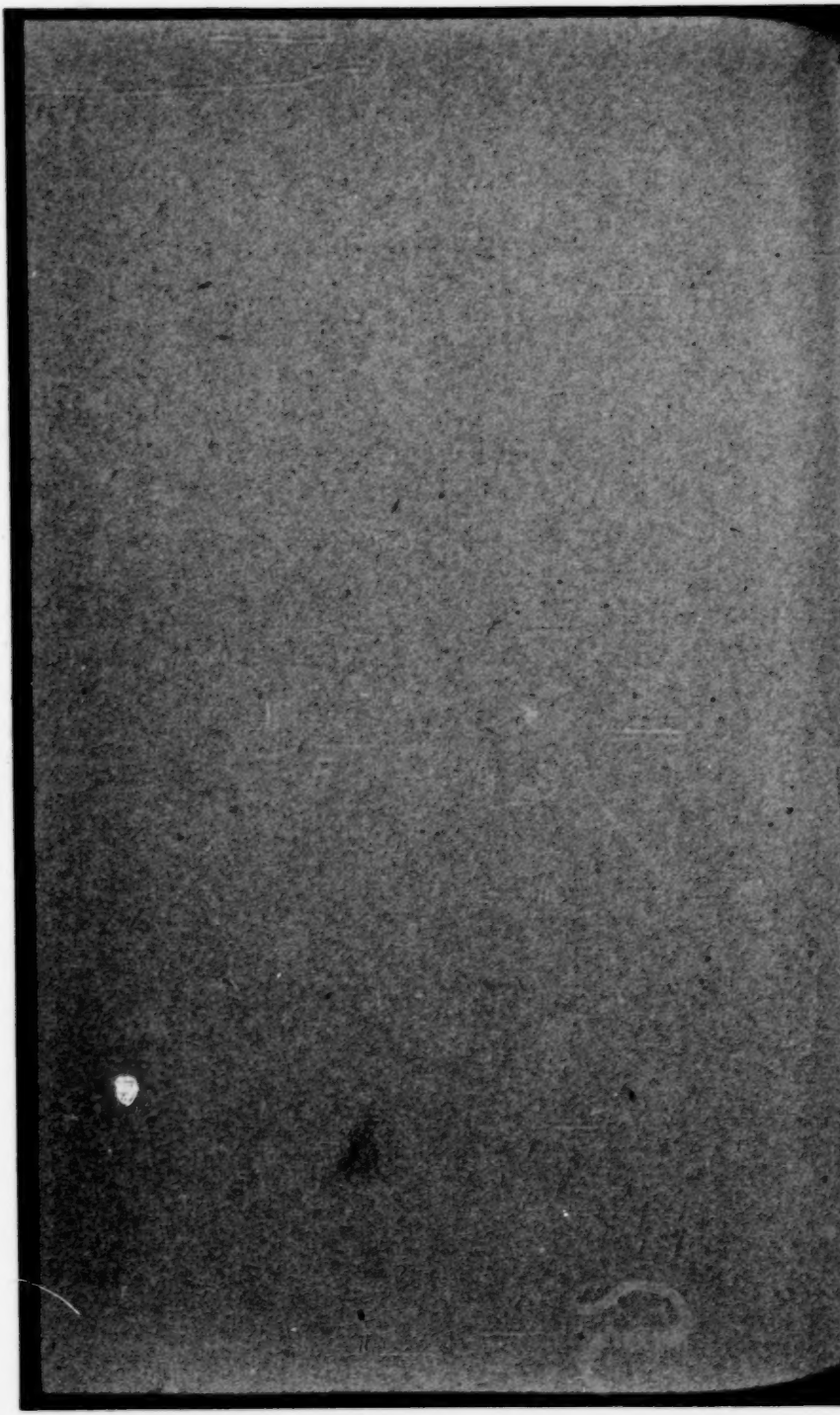
vs.

McCREW COAL COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED MARCH 6, 1911.

(27,990)



(27,520)

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OCTOBER TERM, 1919.

No. 765.

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vs.

McGREW COAL COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 In the Supreme Court of the State of Missouri, October Term, 1919.

No. 19150.

McGrew Coal Company, Respondent,

vs.

The Missouri Pacific Railway Company, Appellant.

Praecipe for Record.

To Hon. J. D. Allen, Clerk of the Supreme Court of Missouri:

In obedience to the command of the writ of error issued in the above cause from the Supreme Court of the United States to the Supreme Court of the State of Missouri, on February 10, 1920, you will please send to the Supreme Court of the United States, as commanded in said writ, the following record of the entries, proceedings and matters in said cause, to-wit:

(1). Said writ of error.

(2). Your return to same.

(3). The citation issued in said cause, with the acknowledgment of service thereon by the attorneys for defendant in error, McGrew Coal Company.

(4). Record entry of your court showing the filing and date of filing of the certified copy of judgment in said cause entered by the Circuit Court of Lafayette County, Missouri, together with the filing and date of filing of the order of said Circuit Court granting an appeal in said cause from said Circuit Court of Lafayette County to the Supreme Court of the State of Missouri.

(5). Said certified copy of said judgment and order granting appeal.

(6). The complete abstract of the record filed in said cause.

(7). Order of the Supreme Court of Missouri showing the submission of said cause to said court.

(8). The judgment and opinion of the Supreme Court of Missouri by Brown, Commissioner, and order of Court transferring said cause to the Court En Banc for decision.

2 (9). The judgment, order and opinion of the Supreme Court of Missouri En Banc, entered in said cause.

(10). Order of the Supreme Court of Missouri filing appellant's motion for rehearing in said cause.

(11). Said motion for rehearing.

(12). Order of the Supreme Court of Missouri overruling said motion for rehearing.

(12). Copy of the opinion of the Supreme Court of Missouri En Banc, in case of McGrew v. The Missouri Pacific Railway Company, 230 Mo. p. 496.

(14). Order of the Supreme Court of Missiouri showing presentation to the Honorable Robert F. Walker, Chief Justice of said Supreme Court of the State of Missouri, of the following matters in said cause, to-wit: a petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, together with an assignment of errors committed by said Missouri Supreme Court, a citation directed to the Respondent (Defendant in Error) citing it to appear at the Supreme Court of the United States in not exceeding thirty days from the date of the citation; also Appellant's (Plaintiff's in Error) bond in the sum of Two Thousand Dollars, and showing the filing of said petition and assignment of errors, the allowance of said writ of error, the signing of said citation and the approval and filing of said bond.

(15). The said petition for writ of error in said cause.

(16). The said assignment of errors in said cause.

(17). Bond filed in said cause.

Very respectfully yours,

THE MISSOURI PACIFIC RAILWAY COMPANY,
(Appellant, as Plaintiff in Error.)
By HARVEY C. CLARK,
EDW. J. WHITE AND
JAMES F. GREEN,
Its Attorneys.

Service of a true copy of the foregoing praecipe is hereby acknowledged this thirteenth day of February, 1920.

EDWIN A. KRAUTHOFF,
Attorney for Respondent, (Defendant in Error.)

2½ [Endorsed:] In the Supreme Court of Missouri. Case No. 19,150. Div. —. McGrew Coal Company, respondent, vs. The Mo. Pac. Ry. Co., appellant. Praecipe for Record. Edw. J. White, Jas. F. Green, H. H. Larimore, attorneys for appellant.

3 In the Supreme Court of the State of Missouri, October Term, 1919.

No. 19150.

McGrew Coal Company, Respondent,

vs.

The Missouri Pacific Railway Company, Appellant.

United States of America, ss:

The President of the United States to the Judges of the Supreme Court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the cause of McGrew Coal Company, Respondent, vs. The Missouri Pacific Railway Company, Appellant, No. 19150, which is in the said Supreme Court before you—being the highest court of law or equity in said State wherein a decision could be had in said cause—at the October Term, 1919, thereof—final judgment having been rendered on the 22d day of December, 1919, and appellant's motion for rehearing having been overruled January 26, 1920,—a manifest error hath happened to the great damage of appellant, The Missouri Pacific Railway Company, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, distinctly and openly under your seal, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., not exceeding thirty days from and after the date of the citation in said cause, in the said Su-
4 preme Court to be then and there held; that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 10th day of February, A. D. 1920.

Issued at office in the City of Jefferson, with the seal of the District Court of the United States for the Central Division of the Western District of Missouri, this 10th day of February, A. D. 1920.

[Seal of the United States District Court of Missouri, Central Division, Western District.]

EDWIN R. DURHAM,
Clerk of the United States District Court, Western District of Missouri, Central Division.
By H. C. GEISBERG, *Deputy.*

Allowed by

R. F. WALKER,
Chief Justice of the Supreme Court of the State of Missouri.

4½ [Endorsed:] In the Supreme Court of Missouri. Case No. 19,150. Div. —. McGrew Coal Company, respondent, vs. The Mo. Pac. Ry. Co., appellant. Writ of Error. Edw. J. White Jas F. Green, H. H. Larimore, attorneys for appellant.

5 STATE OF MISSOURI, *ss:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, in obedience to the mandate of the within writ of error, and as directed by the precipe for record, herewith transmit to the Honorable Supreme Court of the United States, a true transcript of the record and proceedings in the cause of McGrew Coal Company, Respondent, vs. The Missouri Pacific Railway Company, Appellant, No. 19,150, as full and complete as called for in the said precipe, and as fully as the same remain of record and on file in my office, and herewith also transmit, as directed by said precipe, a full, true and complete copy of the opinion of the said Supreme Court of the State of Missouri in the case of McGrew v. The Missouri Pacific Railway Company, 230 Mo. p. 496.

In testimony whereof, I hereunto set my hand and affix the seal of said Supreme Court, at office in the City of Jefferson, State aforesaid, this 29th day of February, 1920.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.

6 In the Supreme Court of the State of Missouri, October Term 1919.

No. 19150.

McGREW COAL COMPANY, Respondent,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

The United States of America to McGrew Coal Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, D. C., not exceeding thirty days from and after the day this citation bears date,

pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Missouri, wherein The Missouri Pacific Railway Company is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Robert F. Walker, Chief Justice of the Supreme Court of Missouri, this 10th day of February, in the year of our Lord, One Thousand Nine Hundred and Twenty.

R. F. WALKER,
Chief Justice.

UNITED STATES OF AMERICA,
Central Division of the Western
District of Missouri, ss:

I hereby acknowledge service of the within citation, this thirteenth day of February, A. D. 1920.

EDWIN A. KRAUTHOFF,
Attorney for Defendant in Error.

6½ In the Supreme Court of Missouri. Case No. 19,150. Div. —. McGrew Coal Company, Respondent, vs. The Mo. Pac. Ry. Co., Appellant. Citation. Edw. J. White, Jas. F. Green, H. H. Larimore, Attorneys for Appellant.

7 UNITED STATES OF AMERICA.
State of Missouri, ss:

Be it remembered that, heretofore, to wit, on the 30th day of July, 1915, there was filed in the office of the clerk of the Supreme Court of the State of Missouri, in a cause between McGrew Coal Company, Plaintiff (Respondent), and The Missouri Pacific Railway Company, Defendant (Appellant), No. 19,150, a certified transcript of the record, files and proceedings of the Circuit Court of Lafayette County, Missouri, in said cause, including transcript of the judgment of said circuit court in said cause, and of the order of said circuit court granting an appeal from said judgment to the Supreme Court of the State of Missouri, which said transcript of said judgment and of said order granting an appeal, together with the certificate of the clerk of said circuit court to the transcript filed as aforesaid, is in the words and figures following, to wit:

And afterward to wit, on the 29th day of April, 1915, the same being the seventeenth day of said regular February Term of said Court for said year, the following further proceedings were had in said Court in said cause, to wit:

And all and singular the facts being heard and seen and the Court being fully advised in the premises, doth find the issues for the plaintiff.

It is therefore considered and adjudged by the Court that the plaintiff herein have and recover of the defendant judgment upon the following counts of said petition for the following amounts, to wit:

8 The Court doth find the issue for the plaintiff upon the 1st count of the petition and assess its damage at the sum of $80.05.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 1st count for the sum of $80.05.

The Court doth find the issue for the plaintiff upon the 2nd count of the petition and assess its damages at the sum of $1,361.17.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 2nd count for the sum of $1,361.17.

The Court doth find the issue for the plaintiff upon the 3rd count of the petition and assess its damage at the sum of $36.43.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 3rd count for the sum of $36.43.

The Court doth find the issue for the plaintiff upon the 4th count of the petition and assess its damage at the sum of $34.43.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 4th count for the sum of $34.43.

The Court doth find the issue for the plaintiff upon the 5th count of the petition and assess its damage at the sum of $60.06.

It is therefore ordered and adjudged by the Court that plaintiff have and recover against defendant upon said 5th count for the sum of $60.06.

The Court doth find the issue for the plaintiff upon the 6th count of the petition and assess its damage at the sum of $26.75.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 6th count for the sum of $26.75.

9 The Court doth find the issue for the plaintiff upon the 7th count of the petition and assess its damage at the sum of $56.81.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 7th count for the sum of $56.81.

The Court doth find the issue for the plaintiff upon the 8th count of the petition and assess its damage at the sum of $255.02.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 8th count for the sum of $255.02.

The Court doth find the issue for the plaintiff upon the 9th count of the petition and assess its damage at the sum of $131.37.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 9th count for the sum of $131.37.

The Court doth find the issue for the plaintiff upon the 10th count of the petition and assess its damage at the sum of $10.11.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 10th count for the sum of $10.11.

The Court doth find the issue for the plaintiff upon the 11th count of the petition and assess its damage at the sum of $112.08.

It is therefore ordered and adjudged by the Court that plaintiff have and recover against defendant upon said 11th count for the sum of $112.08.

The Court doth find the issue for the plaintiff upon the 12th count of the petition and assess its damage at the sum of $53.43.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 12th count for the sum of $53.43.

10 The Court doth find the issue for the plaintiff upon the 13th count of the petition and assess its damage at the sum of $68.46.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 13th count for the sum of $68.46.

The Court doth find the issue for the plaintiff upon the 14th count of the petition and assess its damage at the sum of $40.88.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 14th count for the sum of $40.88.

The Court doth find the issue for the plaintiff upon the 15th count of the petition and assess its damage at the sum of $149.17.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 15th count for the sum of $149.17.

The Court doth find the issue for the plaintiff upon the 16th count of the petition and assess its damage at the sum of $206.51.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 16th count for the sum of $206.51.

The Court doth find the issue for the plaintiff upon the 17th count of the petition and assess its damage at the sum of $34.98.

It is therefore ordered and adjudged by the Court that plaintiff have and recover against defendant upon said 17th count for the sum of $34.98.

The Court doth find the issue for the plaintiff upon the 18th count of the petition and assess its damage at the sum of $1,072.26.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 18th count for the sum of $1,072.26.

11 The Court doth find the issue for the plaintiff upon the 19th count of the petition and assess its damage at the sum of $108.62.

It is therefore ordered and adjudged by the Court that plaintiff

have and recover judgment against defendant upon said 19th count for the sum of $108.62.

The Court doth find the issue for the plaintiff upon the 20th count of the petition and assess its damage at the sum of $16.02.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 20th count for the sum of $16.02.

The Court doth find the issue for the plaintiff upon the 21st count of the petition and assess its damage at the sum of $33.05.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 21st count for the sum of $33.05.

The Court doth find the issue for the plaintiff upon the 22nd count of the petition and assess its damage at the sum of $10.69.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 22nd count for the sum of $10.69.

The Court doth find the issue for the plaintiff upon the 23rd count of the petition and assess its damage at the sum of $220.05.

It is therefore ordered and adjudged by the Court that plaintiff have and recover against defendant upon said 23rd count for the sum of $220.05.

The Court doth find the issue for the plaintiff upon the 24th count of the petition and assess its damage at the sum of $350.25.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 24th count for the sum of $350.25.

12 The Court doth find the issue for the plaintiff upon the 25th count of the petition and assess its damage at the sum of $14.20.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 25th count for the sum of $14.20.

The court doth find the issue for the plaintiff upon the 26th count of the petition and assess its damage at the sum of $900.75.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 26th count for the sum of $900.75.

The Court doth find the issue for the plaintiff upon the 27th count of the petition and assess its damage at the sum of $54.19.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 27th count for the sum of $54.19.

The Court doth find the issue for the plaintiff upon the 28th count of the petition and assess its damage at the sum of $87.67.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 28th count for the sum of $87.67.

The Court doth find the issue for the plaintiff upon the 29th count of the petition and assess its damage at the sum of $194.60.

It is therefore ordered and adjudged by the Court that plaintiff

have and recover against defendant upon said 29th count for the sum of $194.60.

The Court doth find the issue for the plaintiff upon the 30th count of the petition and assess its damage at the sum of $124.65.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 30th count for the sum of $124.65.

13 The Court doth find the issue for the plaintiff upon the 31st count of the petition and assess its damage at the sum of $81.68.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 31st count for the sum of $81.68.

The Court doth find the issue for the plaintiff upon the 32nd count of the petition and assess its damage at the sum of $1.09.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 32nd count for the sum of $1.09.

The Court doth find the issue for the plaintiff upon the 33rd count of the petition and assess its damage at the sum of $65.12.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 33rd count for the sum of $65.12.

The Court doth find the issue for the plaintiff upon the 34th count of the petition and assess its damage at the sum of $32.40.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 34th count for the sum of $32.40.

The Court doth find the issue for the plaintiff upon the 35th count of the petition and assess its damage at the sum of $5,887.41.

It is therefore ordered and adjudged by the Court that plaintiff have and recover against defendant upon said 35th count for the sum of $5,887.41.

The Court doth find the issue for the plaintiff upon the 36th count of the petition and assess its damage at the sum of $24.44.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 36th count for the sum of $24.44.

14 The Court doth find the issue for the plaintiff upon the 37th count of the petition and assess its damage at the sum of $247.98.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 37th count for the sum of $247.98.

The Court doth find the issue for the plaintiff upon the 38th count of the petition and assess its damage at the sum of $1,001.60.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 38th count for the sum of $1,001.60.

The Court doth find the issue for the plaintiff upon the 39th count of the petition and assess its damage at the sum of $60.12.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 39th count for the sum of $60.12.

The Court doth find the issue for the plaintiff upon the 40th count of the petition and assess its damage at the sum of $11.55.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 40th count for the sum of $11.55.

The Court doth find the issue for the plaintiff upon the 41st count of the petition and asses its damage at the sum of $36.96.

It is therefore ordered and adjudged by the Court that plaintiff have and recover against defendant upon said 41st count for the sum of $36.96.

The Court doth find the issue for the plaintiff upon the 42nd count of the petition and asses its damage at the sum of $104.92.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 42nd count for the sum of $104.92.

15 The Court doth find the issue for the plaintiff upon the 43rd count of the petition and asses its damage at the sum of $11.91.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 43rd count for the sum of $11.91.

The Court doth find the issue for the plaintiff upon the 44th count of the petition and asses its damage at the sum of $7.31.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 44th count for the sum of $7.31.

The Court doth find the issue for the plaintiff upon the 45th count of the petition and asses its damage at the sum of $7.68.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 45th count for the sum of $7.68.

The Court doth find the issue for the plaintiff upon the 46th count of the petition and asses its damage at the sum of $344.07.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 46th count for the sum of $344.07.

The Court doth find the issue for the plaintiff upon the 47th count of the petition and asses its damage at the sum of $62.12.

It is therefore ordered and adjudged by the Court that plaintiff have and recover against defendant upon said 47th count for the sum of $62.12.

The Court doth find the issue for the plaintiff upon the 48th count of the petition and asses its damage at the sum of $6.05.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 48th count for the sum of $6.05.

16 The Court doth find the issue for the plaintiff upon the 49th count of the petition and asses its damage at the sum of $13.74.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 49th count for the sum of $13.74.

The Court doth find the issue for the plaintiff upon the 50th count of the petition and assess its damage at the sum of $11.76.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 50th count for the sum of $11.76.

The Court doth find the issue for the plaintiff upon the 51st count of the petition and assess its damage at the sum of $240.97.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 51st count for the sum of $240.97.

The Court doth find the issue for the plaintiff upon the 52nd count of the petition and assess its damage at the sum of $44.95.

It is therefore ordered and adjudged by the Court that plaintiff have and recover judgment against defendant upon said 52nd count for the sum of $44.95.

Aggregating upon all the counts the sum of $14,303.77.

It is therefore ordered and adjudged by the Court that plaintiff herein have and recover of the defendant judgment herein for said total sum of $14,303.77, and judgment for its costs herein and that it have execution therefor. To which action and judgment of the Court in rendering judgment on each and every one of the fifty-two counts of said petition, the defendant at the time objected and excepted.

17 And afterward, to-wit, on the 20th day of April, 1915, the same being the seventeenth day of the said regular February Term of said Court for said year, the following further proceedings were had in said Court in said cause, to-wit:

No. 264.

McGrew Coal Company, Plaintiff,

vs.

The Missouri Pacific Railway Company, Defendant.

Now at this day comes the defendant herein by its attorneys and files its affidavit for an appeal of this cause and deposits with the Clerk of this Court the sum of Ten Dollars ($10.00) docket fee for the Appellate Court and said affidavit for appeal being taken up and submitted to the Court and being duly examined and approved and found sufficient and in due form, an appeal of said cause is allowed the defendant and granted by the Court to the Supreme Court of the State of Missouri. And leave is given the defendant to file an appeal bond in the sum of Twenty-Eight Thousand Dollars ($28,000) within ten days after the adjournment of this term of Court, said appeal bond to be approved by the Clerk of this Court. And

leave is also given the defendant to file its bill of exceptions herein on or before June 15, 1915.

18 STATE OF MISSOURI,
County of Lafayette, ss:

I, W. T. Tutt, Clerk of the Circuit Court within and for said County and State, and in whose custody the records, files and journals of this Court are by the laws of this State required to be kept, do hereby certify that the above and foregoing is a full, true and complete transcript of all records, files and proceedings of the Lafayette County Circuit Court in the cause of McGrew Coal Company, plaintiff, against The Missouri Pacific Railway Company, defendant, on the days and years as above mentioned as fully as the same appears of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the Official Seal of said Court at my office in the City of Lexington, Missouri, this 29th day of July, 1915.

[SEAL.]

W. T. TUTT,
Clerk Circuit Court,
By FRANK BOWMAN,
Deputy.

19 And thereafter, to-wit, on the 27th day of August, 1917, there was filed in said cause, in the office of said clerk of the Supreme Court of the State of Missouri, Appellant's Abstract of the Record, which said abstract of the record is in the words and figures following, to-wit:

In the Supreme Court of Missouri.

No. —.

MCGREW COAL COMPANY (Plaintiff), Respondent,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY (Defendant), Appellant.

Appellant's Abstract of the Record.

Petition.

This petition, filed in the Circuit Court of Lafayette County, Missouri, returnable to the February term, 1915, contains fifty-two counts. Each count is based upon alleged illegal charges on shipment of coal from Myrick, Missouri, to some other station on the line of defendant's railroad in the State of Missouri. All the counts are identical except as to dates, amount of coal shipped, the rate

charged, the destination and the comparative rate charged by the defendant for shipment between the points mentioned.

20 The first count of the petition is based upon an alleged overcharge in the shipment of coal from the plaintiff's mines at Myrick in Lafayette County, Missouri, to Blackwater, another station on defendant's road in Saline County. It is as follows:

In the Circuit Court of Lafayette County, Missouri, at Lexington. February Term, 1915.

McGrew Coal Company, Plaintiff,

vs.

Missouri Pacific Railway Company, Defendant.

Plaintiff avers that on April, 1908, it was and still is a coal mining company incorporated under the law of the State of Missouri.

Plaintiff for 1st cause of action avers that on October, 1879, the defendant was, and has ever since been, a railroad corporation, duly organized under the law of said State and a common carrier for hire of freight and passengers between its stations hereinafter named in said State.

That within five years last past, and on the dates hereinafter named in exhibit No. 1, plaintiff produced and sold bituminous coal from its mines near Myrick, one of defendant's stations in said county, and that on the various dates named in Exhibit No. 1, and in the cars therein described by Number and Initial, he shipped, by defendant's road, from said Myrick in the aggregate 640,400 pounds of his said coal in car load lots to the consignees named in said Exhibit at Blackwater, another station on defendant's road in said State.

21 Plaintiff avers that for the said carriage of said coal defendant fixed, charged, demanded and received of the plaintiff 65 cents per ton, an illegal freight rate, being 25 cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all said times and dates herein named defendant had fixed, charged, demanded and received for the carriage of the same class of coal over its said line and over another part of its said road from its station of Waverly, and to another of its said stations, viz. Kansas City, in said state, a distance of 863.84 miles 40 cents per ton by the car load, while the distance from said Myrick to said Blackwater was only 60.62 miles for which said rate of 65 cents per ton for said carriage was fixed, charged, demanded and received of plaintiff as aforesaid; and the same was illegal and exceeded the amount the defendant was entitled to fix, charge, demand and receive for said shipments by the sum of $80.05.

And the plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge in the sum of $80.05. Wherefore, he prays judgment for the same and for said damages not exceeding

$1,000 and for all other and general relief according to the Statute in such case made and provided.

ALEXANDER GRAVES,
Attorney for Plaintiff.

The remaining counts are identical with this one, except as to dates, the amount of coal shipped, the rate charged, destination and the comparative rates charged by the defendant for shipments between points given in said counts. For instance,
22 in the second count the shipment was from Myrick to Boonville, in Cooper County, on the Lexington branch, a distance of 76.71 miles where the rate charged was sixty-five cents per ton, and comparison is made with the rate charged by the defendant on like shipments on its road from Liberal in Barton County to Granby in Newton County, a distance of 77.14 miles, where the rate charged was fifty cents per ton. The remaining counts cover shipments from Myrick to various stations on defendants road and comparison is made with the rates charged between other points on the defendant's line in various parts of the state where a less rate is charged for a greater distance. To save incumbering the record, the other counts in the petition will not be set out in full.

To this petition, the defendant filed the following:

Answer.

In the Circuit Court of Lafayette County, Missouri, at Lexington, February Term, 1915.

McGrew Coal Company, Plaintiff,

vs.

The Missouri Pacific Railway Company, Defendant.

Comes now the defendant, The Missouri Pacific Railway Company, and for its answer to the plaintiff's petition and to each and every count thereof, said counts being numbered one to fifty-two inclusive, admits that it is and at all the dates therein men-
23 tioned, was a railroad corporation owning and operating the line of railroad mentioned therein, and that as such, it is and was a common carrier of passengers and freight, but it denies each and every other allegation therein contained.

Wherefore, having fully answered, it prays to go hence with its costs.

For further answer to said petition and to each and every count thereof, said counts being numbered one to fifty-two inclusive, it avers that said petition and each and every count thereof, to wit, counts one to fifty-two inclusive, are founded upon the Session Laws of Missouri, 1872, page 69, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the

Constitution of Missouri, 1875, and that said sections are null and void and of no legal force and effect for the following reasons:

(a) Because said Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, when enacted by the Legislature, were passed in violation of Section 32 of Article I of the Constitution of Missouri, 1865, in this: That the title of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, purports to prevent unjust discrimination in freight rates, whereas, the body of said Act prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable, and the subject of said act is not therefore expressed in its title.

(b) Because said Sections 3173 and 3211 are repugnant to and in violation of Section 11 of Article 12 of the Constitution of Missouri, 1875, in this: That said section of the Constitution
24 provides for the passage of laws to correct abuses and prevent unjust discrimination and extortions in freight and passenger rates, and establishing reasonable maximum freight rates, whereas the body of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable and fixes arbitrary, unfair and unreasonable maximum rates.

(c) Because said Sections 3173 and 3211 Revised Statutes of Missouri, 1909, when reenacted by the Legislature in 1879, were not legally reenacted but were enacted in violation of Section 28 of Article 4 of the Constitution of Missouri, 1875, in this: That the title of said Act as passed makes the same appear to be an Act to prevent unjust discrimination, whereas, the body of said Act prohibits discrimination of all kinds without regard to whether the rates fixed are unjust or just and reasonable, and the subject of said Act is not therefore clearly expressed in its title.

(d) Because said Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, were repealed by an Act of the Legislature passed in 1887 entitled, "An Act to Regulate Railroad Corporations," passed at the extra sessions of 1887, same being found in the Session Laws of 1887, at page 15, now Sections 3185 and 3193 of the Revised Statutes, 1909.

For further answer to said petition and to each and every count thereof, said counts being numbered one to fifty-two inclusive, the defendant says that Section 12 of Article 12 of the Constitution of Missouri, 1875, and Sections 3173 and 3211 and Sections
25 3185 and 3193 of the Revised Statutes of Missouri, 1909, are in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States in this: That said Sections of the Constitution of Missouri and of the Revised Statutes of Missouri deprive defendant of its property without due process of law and denies to it equal protection of the laws.

For further answer to said petition and to each and every count thereof, said counts being numbered one to fifty-two inclusive, the

defendant says that Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, are repugnant to and in violation of Article 5 of the Amendments to the Constitution of the United States in this: That said sections deprive the defendant of its property without due process of law.

For further answer to said petition and to each and every count thereof, said counts being numbered one to fifty-two inclusive, the defendant says that sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: That the said defendant is engaged in interstate commerce and owns and operates various lines of railroad as a part of its system which run into other states than Missouri and into the states of Kansas, Colorado, Nebraska, Oklahoma, Illinois, Arkansas and Louisiana, and that the train in which the plaintiff's property described in said counts was being transported was at the time engaged in interstate commerce and contained car load lots and shipments of merchandise consigned and being carried from points without the State of Missouri to points within
26 this state, and from points within this state to points without the same and from points without this state across the state of Missouri and to points in other states, and that by reason of the premises this state is without jurisdiction to adopt and pass the sections herein named and to enforce the provisions of the same against this defendant while so engaged in interstate commerce.

For further answer to said petition and to each and every count thereof, said counts being numbered one to fifty-two inclusive, the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with the Section 8 of Article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: That the defendant's railroad is an interstate road and its lines extend over and through the States of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louisiana, and that it is engaged in interstate commerce over its said lines through all of the said States and operates trains over the same in transporting freight and passengers through said States; that said section of the Constitution of Missouri and sections of the Revised Statutes seek to compel the defendant arbitrarily to fix its rates in this State and in all of said States and in comparison with rates existing in all such States without regard to the laws passed by Congress regulating interstate commerce.

Wherefore, having fully answered, defendant prays to go hence with its costs.

JAMES F. GREEN,
HARVEY C. CLARK,
Attorneys for Defendant.

27 To this answer the plaintiff filed the following:

Demurrer.

McGrew Coal Co., Plaintiff,

vs.

The Mo. Pac. Ry. Co., Defendant.

Comes now the plaintiff and demurs to the following part and portion of the defendant's answer, to-wit:—All the special defenses pleaded therein to each of the counts in the petition numbered from 1 to 52 inclusive, each of said special pleas being substantially in words and figures following, to-wit:—

For further answer to said petition and to each and every count thereof, said counts being numbered 1 to 52 inclusive, it avers that said petition and each and every count thereof, towit:—Counts 1 to 52 inclusive, are founded upon the Session Laws of Missouri 1872 page 69, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri 1875, and that said Sections are null and void and of no legal force and effect for the following reasons:

(*a*) Because said sections 3173 and 3211 of the Revised Statutes of Missouri 1909, when enacted by the Legislature were passed in violation of Section 32 of Article 4 of the Constitution of Missouri 1865, in this: That the title of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri 1909, purports to prevent unjust discrimination in freight rates, whereas the body of said Act prohibits discrimination of all kinds without
28 regard to whether the same is unjust or just and reasonable, and the subject of said Act is not therefore expressed in its title.

(*b*) Because said Sections 3173 and 3211 are repugnant to and in violation of Section 14 of Article 12 of the Constitution of Missouri 1875 in this: That said Section of the Constitution provides for the passage of laws to correct abuses and prevent unjust discrimination and extortion in freight and passenger rates and establishes reasonable, maximum freight rates, whereas the body of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable and fixes arbitrary, unfair and unreasonable maximum rates.

(*c*) Because said Sections 3173 and 3211 Revised Statutes of Missouri, 1909, when re-enacted by the legislature in 1879 were not legally re-enacted but were enacted in violation of Section 28 of Article 4 of the Constitution of Mo. 1875 in this: That the title of said Act as passed makes the same appear to be an Act to

prevent unjust discrimination, whereas the body of said Act prohibits discrimination of all kinds without regard to whether the rates fixed are unjust or just and reasonable, and the subject of said Act is not therefore clearly expressed in its title.

(d) Because said Sections 3173 and 3211 of the Revised Statutes of Mo. 1889 were repealed by an Act of the legislature passed in 1887 entitled, "An Act to regulate railroad corporations," passed at the extra session in 1887, same being found in the Session Laws of 1887 at page 15, now Sections 3185 and 3193 of the Revised Statutes 1889.

20 For further answer to said petition and to each and every count thereof, said counts being numbered 1 to 52 inclusive, the defendant says that Section 12 of Article 12 of the Constitution of Mo. 1875 and Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Mo. 1889 are in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States in this: That said Sections of the Constitution of Mo. and of the Revised Statutes of Mo. deprive the defendant of its property without due process of law and denies to it the equal protection of the laws.

For further answer to said petition and to each and every count thereof, said counts being numbered 1 to 52 inclusive, the defendant says that Sections 3173 and 3211 of the Revised Statutes of Mo. 1889, are repugnant to and in violation of Article 5 of the Amendments to the Constitution of the United States in this: That said Sections deprive the defendant of its property without due process of law.

And plaintiff assigns as grounds and reason in support of this demurrer the following, to-wit:

First. Said parts of said answer and the alleged defenses therein set forth are based upon an erroneous construction of said provisions of the State and Federal Constitutions, and upon an erroneous construction of the statutory provisions referred to in said answer.

Second. Said parts of said answer and defenses as pleaded, allege erroneous legal conclusions drawn from said constitutional and statutory provisions referred to therein.

30 Third. They state no facts constituting any defense to the causes of action contained in the petition.

Fourth. They are improperly pleaded in the answer and can only be urged by demurrer to the petition.

ALEXANDER GRAVES,
Attorney for Plaintiff.

To the last two counts in the defendant's answer the plaintiff filed the following:

Reply.

McGrew Coal Co., Plaintiff.

vs.

The Mo. Pac. Ry. Co., Defendant.

Now comes plaintiff — for reply to the last two special defenses set forth in the answer of the defendant wherein it is alleged, among other things, that section 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Mo. 1909 and Section 12 of Article 12 of the Constitution of Mo. 1875, are in conflict with Section 8 of Article I of the Constitution of the United States and the various laws passed by Congress thereunder and denies each and every allegation therein contained.

And for further reply the plaintiff avers that all the points and stations specified in the petition and each count thereof are
31 wholly within the State of Missouri and are reached by defendant's cars wholly engaged in intrastate or domestic traffic and that upon said coal being delivered by plaintiff to the defendant to be transported by it to the points as alleged in the petition the defendant issued to the plaintiff bills of lading therefor and that thereafter plaintiff had no further control of said coal and at no time directed that the cars containing said coal should be incorporated in trains engaged in interstate traffic and that if any of said cars were so placed in trains doing inter-state commerce it was done on the defendant's own motion and for defendant's own convenience and wholly without the knowledge or consent of the plaintiff.

Wherefore plaintiff reaffirms the allegations of its petition and of each count thereof and prays for judgment in accordance with the prayers of each of said counts.

ALEXANDER GRAVES,
Attorney for Plaintiff.

The court sustained the demurrer to the defendant's answer, to which action the defendant duly objected and excepted.

Afterwards, on April 20, 1915, a jury being waived, the case was by consent of the parties tried by the court without the intervention of a jury. The court found the issues for the plaintiff and rendered judgment on each count of the petition in the sums following:

32 *Judgment.*

First count	880.66
Second count	1,361.47
Third count	36.43
Fourth count	34.43
Fifth count	60.66
Sixth count	26.77
Seventh count	56.81
Eighth count	333.02
Ninth count	131.77
Tenth count	10.11
Eleventh count	112.08
Twelfth count	33.43
Thirteenth count	68.46
Fourteenth count	40.88
Fifteenth count	159.17
Sixteenth count	206.51
Seventeenth count	34.90
Eighteenth count	1,072.26
Nineteenth count	108.62
Twentieth count	16.02
Twenty-first count	33.65
Twenty-second count	10.69
Twenty-third count	220.65
Twenty-fourth count	350.25
Twenty-fifth count	14.20
Twenty-sixth count	980.73
Twenty-seventh count	54.19
Twenty-eighth count	87.67
Twenty-ninth count	194.00
Thirtieth count	124.65
Thirty-first count	81.68
Thirty-second count	4.09
Thirty-third count	65.12
Thirty-fourth count	32.40
Thirty-fifth count	3,887.41
Thirty-sixth count	24.44
Thirty-seventh count	247.98
Thirty-eighth count	1,001.00
Thirty-ninth count	60.12
Fortieth count	11.55
Forty-first count	36.96
Forty-second count	104.92
Forty-third count	11.91
Forty-fourth count	7.31
Forty-fifth count	7.68
Forty-sixth count	344.07
Forty-seventh count	62.12

Forty-eighth count	6.65
Forty-ninth count	13.74
Fiftieth count	11.76
Fifty-first count	240.97
Fifty-second count	44.95

Aggregating the total sum of $14,386.77. To which action of the court in rendering judgment on each and every count in the plaintiff's petition, the defendant at the time duly objected and excepted.

Afterwards during said February term, on April 20, 1915, and within four days after the rendition of such decision and judgment, the defendant filed the following motion for new trial:

34 In the Circuit Court of Lafayette County, Missouri, at Lexington. February Term, 1915.

McGREW COAL COMPANY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Comes now the defendant and moves the court to grant it a new trial herein for the following reasons:

1. Because the court erred in sustaining the plaintiff's demurrer to the following portions of its answer to each of the counts in the plaintiff's petition, to wit:

"For further answer to said petition and to each and every count thereof, said counts being numbered 1 to 52 inclusive, it avers that said petition and each and every count thereof, to wit: Counts 1 to 52 inclusive, are founded upon the Session Laws of Missouri 1872 page 62, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri 1875, and that said Sections are null and void and of no legal force and effect for the following reasons:

(a) Because said Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, when enacted by the Legislature were passed in violation of Section 32 of Article 4 of the Constitution of Missouri, 1865, in this: That the title of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri 1909, purports 35 to prevent unjust discrimination in freight rates, whereas the body of said Act prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable, and the subject of said Act is not therefore expressed in its title.

(b) Because said Sections 3173 and 3211 are repugnant to and in violation of Section 14 of Article 12 of the Constitution of Missouri 1875 in this: That said Section of the Constitution provides for the

passage of laws to correct abuses and prevent unjust discrimination and extortion in freight and passenger rates and establishes reasonable maximum freight rates, whereas the body of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri 1909, prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable and fixes arbitrary unfair and unreasonable maximum rates.

(c) Because said Sections 3173 and 3211 Revised Statutes of Missouri 1909, when re-enacted by the legislature in 1879 were not legally re-enacted but were enacted in violation of Section 28 of Article 4 of the Constitution of Mo. 1875 in this: That the title of said Act as passed makes the same appear to be an Act to prevent unjust discrimination, whereas the body of said Act prohibits discrimination of all kinds without regard to whether the rates fixed are unjust or just and reasonable, and the subject of said Act is not therefore clearly expressed in its title.

(d) Because said Sections 3173 and 3211 of the Revised Statutes of Missouri 1909 were repealed by an Act of the legislature passed in 1887 entitled, "An Act to regulate railroad corporations," passed at the extra session 1887, same being found in the Session Laws of 1887 at page 15, now Sections 3185 and 3193 of the Revised Statutes 1909.

36 For further answer to said petition and to each and every count thereof, said counts being numbered 1 to 52 inclusive, the defendant says that Section 12 of Article 12 of the Constitution of Missouri, 1875 and Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, are in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States in this: That said Sections of the Constitution of Missouri and of the Revised Statutes of Missouri deprive the defendant of its property without due process of law and *denies* to it the equal protection of the laws.

For further answer to said petition and to each and every count thereof, said counts being numbered 1 to 52 inclusive, the defendant says that Sections 3173 and 3211 of the Revised Statutes of Missouri 1909, are repugnant to and in violation of Article 5 of the Amendments to the Constitution of the United States in this: That said Sections deprive the defendant of its property without due process of law."

2. Because the court erred in refusing to sustain the defendant's demurrer at the close of the plaintiff's case.

3. Because the court erred in refusing to sustain defendant's demurrer interposed at the close of the whole case.

4. Because the court erred in refusing to declare the law to be that under the pleadings and the proof, the finding must be for the defendant when so requested by the defendant at the close of the plaintiff's case and again at the close of all the evidence in the case.

5. Because the court erred in refusing declarations of law offered by the defendant numbered A. B. C.

37 6. Because under the pleadings and the evidence, the finding should have been for the defendant instead of the plaintiff.

7. Because the court erred in admitting any testimony under the petition, for the reason that the statutes and provisions upon which said petition is based are unconstitutional and void and such petition states no cause of action against the defendant.

8. Because it appears from the evidence herein, that the plaintiff is not entitled to maintain this action under either of the counts in the petition, and if an action can be maintained at all under the facts shown in the testimony, such cause of action accrued to the real party injured and not the plaintiff, such parties being the consignee in the shipments named in the several counts of the petition.

JAMES F. GREEN.
HARVEY C. CLARK.
Attorneys for Defendant.

Afterwards, during said term, on said April 20, 1915, the defendant filed the following motion in arrest of judgment:

In the Circuit Court of Lafayette County, Missouri, at Lexington, February Term, 1915.

McGREW COAL COMPANY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

38 Comes now the defendant and moves the court to arrest the judgment herein for the following reasons:

1. Because the petition does not state facts sufficient to constitute a cause of action against defendant.

2. Because the petition and each and every count thereof is based upon sections of the Statute which are unconstitutional and void.

3. Because upon the whole record, the finding should have been for the defendant instead of the plaintiff.

H. C. CLARK.
Attorney for Defendant.

Afterwards on the said April 20, 1915, and during said term of the court, said motion for new trial was by the court duly considered and overruled, to which action of the court in overruling the same the defendant at the time duly objected and excepted.

Afterwards on the said April 20, 1915, and during said term of the court, said motion in arrest of judgment was by the court duly con-

sidered and overruled, to which action of the court the defendant at the time duly objected and excepted.

Afterwards on April 20, 1915, and during the said February term, the defendant filed an affidavit for appeal and deposited with the clerk the sum of $10.00 docket fee for the appellate court, which affidavit, omitting the caption, is as follows:

H. C. Clark, being duly sworn according to law, upon his oath says that he is the attorney and agent of the defendant, The
39 Missouri Pacific Railway Company, in the above entitled cause and that he makes this affidavit for and in behalf of said defendant. Affiant says that this appeal is not made for vexation or delay, but because the affiant believes that the said appellant, The Missouri Pacific Railway Company, is aggrieved by the judgment and decision of the court herein.

Wherefore, it is prayed that an appeal be granted to the Supreme Court of Missouri.

H. C. CLARK

Subscribed and sworn to before me this 20th day of April, 1915.

W. T. TUTT,
Clerk of the Circuit Court of Lafayette County, Mo.

The court thereupon, on said date and by order duly made of record, granted the defendant an appeal as prayed for to the Supreme Court of the State of Missouri, and defendant was given leave to file its bill of exceptions on or before June 15, 1915.

The defendant duly filed with the clerk of the Supreme Court a certified copy of the judgment and order granting the appeal and deposited the required docket fee with the clerk.

On the 14th day of June, 1915, same being the first day of the regular June, 1915, term of the court, the defendant duly presented its bill of exceptions and the same was by the court duly approved, allowed, signed, sealed and by order of record duly filed, which said bill of exceptions is as follows:

40 In the Circuit Court of Lafayette County, Missouri, at Lexington, Adjourned February Term, 1915.

McGREW COAL COMPANY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Bill of Exceptions.

Be it remembered, that the following proceedings were had, on the 20th day of April, 1915, in the above entitled cause, the same being the 17th day of the Adjourned February Term, 1915, of the Circuit Court of Lafayette County, Missouri, before the Hon. Samuel Davis, Judge, a jury being, by agreement of the parties, waived.

Appearances:

Hon. Alexander Graves for the Plaintiff.
Mr. H. C. Clark for the Defendant.

Mr. Graves, Attorney for Plaintiff: The plaintiff desires to offer the following stipulation, containing an agreed statement of facts in this case.

Mr. Clark: The defendant objects to the introduction of any testimony in this cause, for the reason that the petition does not state facts sufficient to constitute a cause of action against the defendant.

Court: The objection is overruled.

41 To which ruling of the Court the Defendant, by its counsel, then and there duly objected and excepted, and saved its exceptions.

In the Circuit Court of Lafayette County, Missouri, February Adjourned Term, 1915, April 2nd, 1915.

McGrew Coal Co., Plaintiff.

vs.

Missouri Pacific Ry. Co., Defendant.

Stipulation.

It is hereby stipulated between the parties that the defendant's station, the rates charged by the defendant, and amount of coal transported and the distances set out in the several counts of the petition are correctly stated therein.

It is further stipulated that in this case the plaintiff in quoting the price of said coal to the several consignees named in the exhibits herein, instead of quoting f. o. b. at Myrick, quoted a price delivered to the consignees' stations which quotation was based upon the price at Myrick plus the freight rate charged by the defendant; when the coal was received by the consignees such consignee paid defendant's agent the freight charges and forwarded the receipted freight bill to the plaintiff to be credited on the price of said coal as part payment therefor and then such consignee paid the plaintiff the difference between such freight bill and the quotation price.

42 It is further stipulated that such coal was delivered by the plaintiff to the defendant for shipment in the usual and ordinary way without any direction or request by plaintiff as to what particular trains the same must be transported in and that the defendant received and transported the same in the usual ordinary course of business, on the usual train passing over defendants' road.

It is further agreed that the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this state to points without the same, from points with-

out the same to points within this sae and from poins from wihout this state through this state to points in other states.

ALEXANDER GRAVES.
Attorney for Plaintiff.

H. C. CLARK.
Attorney for Defendant.

Mr. Graves: The plaintiff rests.

Mr. Clark: On behalf of the defendant I desire to offer the following instruction, and ask the Court to declare the law to be that under the pleadings and the admissions in this case the plaintiff is not entitled to recover.

Court: The request will be refused and the instruction refused.

To which ruling of the Court in refusing to grant such request and declaration of law on behalf of the defendant, the defendant by its counsel then and there duly objected and excepted and saved its exceptions.

43 Mr. Clark: The defendant does not desire to offer any evidence.

Whereupon the defendant asked the Court to give the following instruction and declaration of law:

A.

"The Court declares the law to be that under the pleadings and admissions in this case the plaintiff is not entitled to recover."

Which declaration of law was by the Court refused. To which action of the Court in refusing to give such instruction and declaration of law, the defendant, by its counsel, then and there duly objected and excepted and saved its exceptions.

The defendant offered the following declarations of law:

B.

"The Court declares the law to be that Section 12 of Article 12 of the Constitution of Missouri 1875, and Sections 3173 and 3211 and Sec- 3185 and 3193 of the Revised Statutes of Missouri, 1909, are in violation of the Constitution of the United States and of Section one, article 14 of the amendments to the Constitution of the United States and of Article 5 of the amendments to the Constitution of the United States."

C.

"The Court declares the law to be that Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, are unconstitutional."

44 Which declarations of law, and each of them were by the Court refused.

To which action of the Court in refusing to give such instructions and declarations of law, and each of them, the defendant, by its

counsel, then and there duly objected and excepted and saved its exceptions.

Whereupon the Court, on said 20th day of April, 1915, the same being the 17th day of the February Adjourned Term of the court, found the issues for the plaintiff, and rendered the following judgment in the above cause:

(Clerk here copy.)

To which action, finding and judgment of the Court the defendant, by its counsel, then and there duly objected and excepted and saved its exceptions.

And afterward, on the said 20th day of April, 1915, the same being the 17th day of February, 1915, Adjourned Term of the Court, and during said term, and within four days after the said finding and rendition of judgment herein, the defendant filed its Motion for a New Trial in the above entitled cause, which said motion is in words and figures as follows:

In the Circuit Court of Lafayette County, Missouri, at Lexington, February Term, 1915.

McGrew Coal Company, Plaintiff.

vs.

The Missouri Pacific Railway Company, Defendant.

45 Comes now the defendant and moves the Court to grant it a new trial for the following reasons:

1. Because the court erred in sustaining the plaintiff's demurrer to the following portions of its answer to each of the counts in the plaintiff's petition, to-wit:

"For further answer to said petition and to each and every count thereof, said counts being numbered 1 to 52 inclusive, it avers that said petition and each and every count thereof, to-wit: Counts 1 to 52 inclusive, are founded upon the Session Laws of Missouri 1872 page 69, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri 1875, and that said Sections are null and void and of no legal force and effect for the following reasons:

(a) Because said sections 3173 and 3211 of the Revised Statutes of Missouri 1909, when enacted by the Legislature were passed in violation of Section 32 of Article 4 of the Constitution of Missouri, 1865, in this: that the title of said Act of 1872, now sections 3173 and 3211 of the Revised Statutes of Missouri 1909, purports to prevent unjust discrimination in freight rates, whereas the body of said Act prohibits discrimination of all kinds without regard to whether

the same is unjust or just and reasonable, and the subject of said Act is not therefore expressed in its title.

(*b*) Because said Sections 3173 and 3211 are repugnant to and in violation of Section 14 of Article 12 of the Constitution of Missouri 1875 in this: That said section of the Constitution provides for the passage of laws to correct abuses and prevent unjust discrimination and extortion in freight and passenger rates and establishes reasonable, maximum freight rates, whereas the body of said Act of 1872, now section- 3173 and 3211 of the Revised Statutes of Missouri, prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable and fixes arbitrary, unfair and unreasonable maximum rates.

(*c*) Because said Sections 3173 and 3211 Revised Statutes of Missouri 1909, when re-enacted by the legislature in 1879 were not legally re-enacted but were enacted in violation of Section 28 of Article 4 of the Constitution of Mo. 1875 in this: That the title of said Act as passed makes the same appear to be an Act to prevent unjust discrimination, whereas the body of said Act prohibits discrimination of all kinds without regard to whether the rates fixed are unjust or just and reasonable, and the subject of said Act is not therefore clearly expressed in its title.

(*d*) Because said Sections 3173 and 3211 of the Revised Statutes of Missouri 1909 were repealed by an Act of the Legislature passed in 1887 entitled, "An Act to regulate railroad corporations," passed at the extra session 1887, same being found in the Session Laws of 1887 at page 15, now Sections 3185 and 3193 of the Revised Statutes 1909.

For further answer to said petition and to each and every count thereof, said counts being numbered 1 to 52 inclusive, the defendant says that Section 12 of Article 12 of the Constitution of Missouri, 1875 and Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, are in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States in this: That said Sections of the Constitution of Missouri and of the Revised Statutes of Missouri deprive the defendant of its property without due process of law and denies to it the equal protection of the laws.

For further answer to said petition and to each and every count thereof, said counts being numbered 1 to 52 inclusive, the
47 defendant says that Sections 3173 and 3211 of the Revised Statutes of Missouri 1909, are repugnant to and in violation of Article 5 of the Amendments to the Constitution of the United States in this: That said Sections deprive the defendant of its property without due process of law."

2. Because the Court erred in refusing to sustain the defendant's demurrer at the close of the plaintiff's case.

3. Because the Court erred in refusing to sustain defendant's demurrer interposed at the close of the whole case.

4. Because the court erred in refusing to declare the law to be that under the pleadings and the proof, the finding must be for the defendant when so requested by the defendant at the close of the plaintiff's case and again at the close of all the evidence in the case.

5. Because the court erred in refusing declarations of law offered by the defendant numbered A, B, C.

6. Because under the pleadings and the evidence, the finding should have been for the defendant instead of the plaintiff.

7. Because the court erred in admitting any testimony under the petition, for the reason that the statutes and provisions upon which said petition is based are unconstitutional and void and such petition states no cause of action against the defendant.

8. Because it appears from the evidence herein, that the plaintiff is not entitled to maintain this action under either of the
18 counts in the petition, and if an action can be maintained at all under the facts shown in the testimony, such cause of action accrued to the real party and not to the plaintiff, such parties being the consignee in the shipments named in the several counts of the petition.

H. C. CLARK,
Attorney for Defendant.

And afterward, on the said 20th day of April, 1915, the same being the 17th day of February, 1915, Adjourned Term of the court, and during said term, and within four days after the said finding and rendition of judgment herein, the defendant, by its counsel, filed its motion in arrest of judgment in the above entitled cause, which said motion is in words and figures as follows:

In the Circuit Court of Lafayette County, Missouri, at Lexington, February Term, 1915.

McGREW COAL COMPANY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Comes now the defendant and moves the Court to arrest the judgment herein for the following reasons:

1. Because the petition does not state facts sufficient to constitute a cause of action against defendant.

19 2. Because the petition and each and every count thereof is based upon sections of the Statute which are unconstitutional and void.

3. Because upon the whole record, the finding should have been for the defendant instead of the plaintiff.

H. C. CLARK,
Attorney for Defendant.

And afterward, on the said 20th day of April, 1915, the same being the 17th day of February 1915 Adjourned Term of the Lafayette County Circuit Court and during said term of court, the Court, having full seen and heard said motion for a new trial, overruled the same and refused to grant the defendant a new trial as therein prayed.

To which action of the Court in overruling the said motion and in refusing to grant the defendant a new trial herein, the defendant, by its counsel, then and there duly objected and excepted and saved its exceptions.

And afterward, on the said 20th day of April, 1915, the same being the 17th day of February 1915 Adjourned Term of the Lafayette County Circuit Court, and during said term of court, the Court, having fully seen and heard said motion in arrest of judgment, overruled the same and refused to arrest the judgment herein.

To which action of the Court in overruling said motion and refusing to arrest the judgment herein, the defendant, by its counsel, then and there duly objected and excepted and saved its exceptions.

50 And afterwards, on the said 20th day of April, 1915, the same being the 17th day of February 1915 Adjourned Term of the Lafayette County Circuit Court, and during said term, the defendant, by its counsel, filed its affidavit for an appeal to the Supreme Court of Missouri, which said affidavit for an appeal is in words and figures as follows, to-wit:

STATE OF MISSOURI,
County of Lafayette, ss:

In the Circuit Court of Lafayette County, Missouri, at Lexington.
February Adjourned Term, 1915.

MCGREW COAL COMPANY, Plaintiff.

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

H. C. Clark, being duly sworn according to law, upon his oath says that he is the attorney and agent of the defendant, The Missouri Pacific Railway Company, in the above entitled cause and that he makes this affidavit for and in behalf of said defendant. Affiant says that this appeal is not made for vexation or delay, but because the affiant believes that the said appellant, The Missouri Pacific Railway Company, is aggrieved by the judgment and decision of the court herein.

Wherefore, it is prayed that an appeal be granted to the Supreme Court of Missouri.

H. C. CLARK.

Subscribed and sworn to before me this 20th day of April, 1915.

W. T. TUTT.
Clerk of the Circuit Court.

And afterward, on the said 20th day of April, 1915, the same being the 17th day of the February 1915 Adjourned Term of the Lafayette County Circuit Court, and during said term, the Court having fully examined and considered said affidavit for appeal filed by the defendant, and approving and finding the same proper and sufficient, granted and allowed the defendant an appeal to the Supreme Court of the State of Missouri, and leave was granted the defendant to file its bill of exceptions herein on or before the 15th day of June, 1915, and leave was granted the defendant to file an appeal bond in the sum of Twenty-eight Thousand Dollars within ten days after the adjournment of court—said bond to be approved by the Clerk.

And afterward, in vacation of the court, on April 22nd, 1915, and within ten days after the adjournment of the February 1915 Adjourned Term of the court, the following further proceedings were had and entered of record, to-wit:

"Now at this day comes the defendant within the time allowed by the Court, and files its appeal bond in the sum of Twenty-eight Thousand Dollars, which said appeal bond was approved by the Clerk of the Circuit Court of Lafayette County, Missouri, April 22nd, 1915."

And now within the time heretofore allowed by the Court, and on the 14th day of June, 1915, and during the Regular June, 1915, Term of the Circuit Court of Lafayette County, Missouri, the defendant presents to the Hon. Samuel Davis, Judge of the Circuit Court of Lafayette County, Missouri, this, its bill of exceptions, and prays that the same may be allowed, signed, sealed and made a part of the record herein, which is accordingly done, this 14th day of June, 1915.

SAMUEL DAVIS,
Judge of the 15th Judicial Circuit of the State of Missouri;
Judge of the Circuit Court of Lafayette County, Missouri.

The above is a true and complete abstract of the record in this case.

JAS. F. GREEN,
HARVEY C. CLARK,
Attorneys for Appellant.

And thereafter, to-wit, on the 10th day of October, 1918, the following further proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, Division No. 1, October Term, 1918.

No. 19150.

McGrew Coal Company, Respondent,

vs.

The Missouri Pacific Railway Company, Appellant.

Come now the said parties, by their attorneys, and after argument herein, submit this cause to the Court.

And thereafter, on the 1st day of March, 1919, the following further proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, Division No. 1, October Term, 1918.

No. 19150.

McGrew Coal Company, Respondent,

vs.

The Missouri Pacific Railway Company, Appellant.

Now at this day, a majority of the Judges not concurring in the opinion herein, it is ordered by the Court that said cause be and the same is hereby transferred to the Court in Banc.

Which said opinion, transferred with said cause to the Court in Banc, is in the words and figures following, to-wit:

33 In the Supreme Court of Missouri, Division No. 1, October Term, 1918.

No. 19150.

McGrew Coal Company, Respondent,

vs.

The Missouri Pacific Railway Company, Appellant.

Appeal from the Circuit Court for Lafayette County.

This petition, filed in the Circuit Court of Lafayette County, Missouri, returnable to the February term, 1915, contains fifty-two counts. Each count is based upon alleged illegal charges of shipment of coal from Myrick, Missouri, to some other station on

the line of defendant's railroad in the State of Missouri. All the counts are identical except as to dates, amount of coal shipped, the rate charged, the destination, and the comparative rate charged by the defendant for shipment between the points mentioned.

The first count is, omitting title and signatures, as follows:

"Plaintiff avers that on April, 1898, it was and still is a coal mining company incorporated under the law of the State of Missouri.

"Plaintiff for first cause of action avers that on October, 1879, the defendant was, and has ever since been, a railroad corporation, duly organized under the law of said State and a common carrier for hire of freight and passengers between its stations hereinafter named in said State.

"That within five years last past, and on the dates hereinafter named in exhibit No. 1, plaintiff produced and sold bituminous coal from its mines near Myrick, one of defendant's stations in said county, and that on the various dates named in Exhibit No. 1, and in the cars therein described by Number and Initial, he shipped, by defendant's road, from said Myrick in the aggregate 640,400 pounds of his said coal in car load lots to the consignees named in said Exhibit at Blackwater, another station on defendant's road in said State.

"Plaintiff avers that for the said carriage of said coal defendant fixed, charged, demanded and received of the plaintiff 65 cents per ton, an illegal freight rate, being 25 cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all said times and dates herein named defendant had fixed, charged, demanded and received for the carriage of the same class of coal over its said line and over another part of its said road from its station of Waverly, and to another of its said stations, viz. Kansas City, in said state, a distance of 63.84 miles 40 cents per ton by the car load, while the distance from said Myrick to said Blackwater was only 60.62 miles for which said rate of 65 cents per ton for said carriage was fixed, charged, demanded and received of plaintiff as aforesaid; and the same was illegal and exceeded the amount the defendant was entitled to fix, charge, demand and receive for said shipments by the sum of $80.05.

"And the plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge in the sum of $80.05. Wherefore, he prays judgment for the same and for said damages not exceeding $1,080 and for all other and general relief according to the Statute in such case made and provided."

The answer admitted that defendant was a corporation, and owned and operated the lines of railway mentioned in the petition, on which it was a common carrier of freight and passengers, and denied generally the other allegations of the petition. It also pleaded specially the unconstitutionality of certain statutes on which it assumed the petition was formed. Issue was joined on all these pleas by demurrer and replication.

The cause was submitted to the court on the pleadings and the following stipulation:

"It is hereby stipulated between the parties that the defendant's station, the rates charged by the defendant, and amount of
37 coal transported and the distance set out in the several counts of the petition are correctly stated therein.

"It is further stipulated that in this case the plaintiff in quoting the price of said coal to the several consignees named in the exhibits herein, instead of quoting f. o. b. at Myrick, quoted a price delivered to the consignee's stations which quotation was based upon the price at Myrick plus the freight rate charged by the defendant; when the coal was received by the consignees such consignee paid defendant's agent the freight charges and forwarded the receipted freight bill to the plaintiff to be credited on the price of said coal as part payment therefor and then such consignee paid the plaintiff the difference between such freight bill and the quotation price.

"It is further stipulated that such coal was delivered by the plaintiff to the defendant for shipment in the usual and ordinary way without any direction or request by plaintiff as to what particular trains the same must be transported in and that the defendant received and transported the same in the usual ordinary course of business, on the usual train passing over defendant's road.

"It is further agreed that the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this state to points without the same, from points without the same to points within this state and from points from without this state through this state to points in other states."

Judgment was rendered for the plaintiff on each count
38 of the petition, aggregating the total sum of $14,308.77, from which this appeal is taken.

I. The statement filed by the appellant in pursuance of the terms of section 280 of the Revised Statutes of 1909, and the rules of this Court made in pursuance thereof, closes with a clear and concise presentation of the issues as follows:

"It is conceded that the rates charged, the distances between the different points and the amount of coal shipped, are as stated by the plaintiff, and the issues of law before this court are:

"1. Whether the plaintiff paid the freight on the several shipments and was in fact damaged as alleged in its petition and is the proper party to bring this action.

"2. Whether, regardless of who in fact paid the freight, the respondent has been damaged and is therefore entitled to recover.

"3. Whether the sections of the statute on which this action is based are constitutional.

"The latter proposition has been decided adversely to the contention of the appellant by this court in prior actions between the same

parties, but the question as to whether or not plaintiff can recover for damages, if any, sustained by the consignee who in fact paid the freight, has never been passed upon by this court."

Notwithstanding this frank declaration, the appellant has favored us with an elaborate brief upon the constitutional questions raised in the trial of the case which are the same in all respects as those involved in the following cases: McGrew v. Missouri Pacific
59 Railway Company, 177 Mo. 533; Same v. Same, 230 Mo. 486; Same v. Same, 258 Mo. 23; Same v. Same, 178 S.W. 1179; and McGrew Coal Company v. the same defendant, 178 S.W. 1179. In each of these the questions were raised by similar pleadings and were presented to the court for determination in the same manner in which they are raised and presented here. They were all against this appellant, and, in the case last cited, this respondent corporation was the plaintiff and we disposed of it in our opinion with the statement that "the questions presented have all been considered heretofore with great care and at great length, and consistently have been decided against appellant," who is also the appellant in this case. That case was taken by writ of error to the Supreme Court of the United States, where the rights claimed by appellant under the Constitution of the United States were adjudged against it and our judgment affirmed (Missouri Pacific Railway Company v. McGrew Coal Company, 244 U. S. 191). For these reasons, we must take the appellant at its word, and consider only the unadjudicated question.

II. Has the plaintiff, in contemplation of law, been injured by the exaction of the illegal charge? If so, may he maintain this suit to recover it back? This depends upon the stipulation upon which the cause was submitted.

The stipulation states that the plaintiff, instead of quoting to his customer a price for the coal f. o. b. at Myrick, quoted a price delivered at its destination. This means that the coal was sold to the consignee f. o. b. at the station of destination. When the
60 coal was delivered, the purchaser paid the illegal freight bill and settled his account with the plaintiff by sending him the defendant's receipt for the amount of freight paid, with the balance in cash. The transaction of sale stated in the stipulation was a simple one. According to its terms, the less the purchaser of the coal paid for freight, the more the plaintiff received in net proceeds from the transaction. The more he paid for freight, the less the plaintiff received for his coal.

The stipulation states that plaintiff's quotation to the purchaser "was based upon the price at Myrick plus the freight rate charged by the defendant." This is probably true. The value of all commodities is based on all the conditions of cost, including transportation. When the consignee of this coal sold some or all of it to his customer, he no doubt based the price upon the cost of the coal in his yard including the illegal charge paid to the defendant, but this would not transfer the right to bring the suit for the overcharge.

We cannot see that the plaintiff stands on any different footing from that upon which it would stand had it paid the freight in advance. While it would, no doubt, then take it into consideration as an element in the selling price of his commodity, that fact would have no effect upon the liability of defendant for the illegal exaction.

This litigation illustrates the just and salutary operation of the rule. The defendant had the physical power to enforce its illegal claim by withholding the delivery. The right of each consumer upon whom the burden ultimately falls to pursue the tortuous course of litigation which has resulted from these transactions would be a barren one. The remedy, to be effective, must lie with the
61 shipper with whom the contract is made, and the amount of the recovery measured by the amount which he is, either directly or through his consignee, forced to pay. This conclusion is well supported by the authorities. Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531; Same case, 221 Fed. 890; Burgess v. Freight Bureau, 13 I. C. C. 668, 680; Jenneson v. Railway, 133 Minn. 268; Service & Wright Lumber Co. v. Railway Co., 67 Oregon, 63, 76; Railroad Co. v. Manufacturing Co., 51 Ill. App. 151; Andalman v. Railway, 153 Ill. App. 169; Railroad Co. v. Crossley, 128 Georgia, 35.

In the foregoing cases, as well as in many others which they cite, this very point is discussed and expressly determined. We call attention to the Georgia case because it presents the question in a striking light. The rate charged, collected from the consignee, and charged to the consignor, who paid it, was not an illegal rate, nor, so far as appears, an unreasonable one. It was simply in excess of a rate made by agreement between the consignor and carrier, and of course liquidated the amount of the excess.

The appellant cites Railroad v. Coal Mining Company, 230 U. S. 184, to sustain its position in this case. In disposing of that case in its application to this, we can do no better than to quote from the opinion of the same court upon the same subject in Southern Pacific Co. v. Darnell-Taenzer Co., supra, as follows: "The cases like Pennsylvania R. R. Co. vs. International Coal Mining Co., 230 U. S. 184, where a party that has paid only the reasonable rates sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter consid-
62 erations. But here the plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss. See Meeker vs. Lehigh Valley R. R. Co., 236 U. S. 412, 429; Mills vs. Lehigh Valley R. R. Co., 238 U. S. 473."

We have expressly held the long- and short-haul provision of section 12 of article 12 of the State Constitution to be self enforcing (McGrew v. Railroad, 230 Mo. 496; Same v. Same, 258 Mo. 23; McGrew Coal Co. v. Same, 178 S. W. 1179). It liquidates the amount of the overcharge at the difference between the charge exacted and paid for the shorter haul, and the rate charged for the longer haul. If it is wrongfully exacted and paid, it is necessarily

the amount to be recovered back. The judgment in this case was rendered accordingly, and is affirmed. Railey, C., not sitting.

STEPHEN S. BROWN,
Commissioner.

Per Curiam:

Blair, P. J., and Bond, J., concur in the foregoing opinion by Brown, C.; Woodson, J., dissents; Graves, J., did not sit in the case. There being no opinion, the cause is transferred to the Court in Banc.

63 And thereafter, on the 22nd day of December, 1919, the following further proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, Court En Banc, October Term, 1919.

19150.

McGREW COAL COMPANY Respondent,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Appeal from the Circuit Court of Lafayette County.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Lafayette County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution. (Opinion filed.)

And on the same day, to-wit, the 22nd day of December, 1919, there was filed the opinion of said Supreme Court in said cause, which said opinion is in the words and figures following, to-wit:

64 In the Supreme Court of Missouri, Division No. 1, October Term, 1918.

No. 19150.

McGrew Coal Company, Respondent,

vs.

The Missouri Pacific Railway Company, Appellant.

Appeal from the Circuit Court of Lafayette County.

This petition, filed in the Circuit Court of Lafayette County, Missouri, returnable to the February term, 1915, contains fifty-two counts. Each count is based upon alleged illegal charges on shipment of coal from Myrick, Missouri, to some other station on the line of defendant's railroad in the State of Missouri. All the counts are identical except as to dates, amount of coal shipped, the rate charged, the destination and the comparative rate charged by the defendant for shipment between the points mentioned.

The first count is, omitting title and signatures, as follows:

"Plaintiff avers that on April —, 1908, it was and still is a coal mining company incorporated under the law of the State of Missouri.

"Plaintiff for 1st cause of action avers that on October —, 1879, the defendant was, and has ever since been, a railroad corporation, duly organized under the law of said State and a common carrier for hire of freight and passengers between its stations hereinafter named in said State.

"That within five years last past, and on the dates hereinafter named in exhibit No. 1, plaintiff produced and sold bituminous
65 coal from its mines near Myrick, one of defendant's stations in said county, and that on the various dates named in Exhibit No. 1, and in the cars therein described by Number and Initial, he shipped by defendant's road from said Myrick in the aggregate 640,400 pounds of his said coal in car load lots to the consignees named in said Exhibit at Blackwater, another station on defendant's road in said State.

"Plaintiff avers that for the said carriage of said coal defendant fixed, charged, demanded and received of the plaintiff 65 cents per ton, an illegal freight rate, being 25 cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all of said times and dates herein named defendant had fixed, charged, demanded and received for the carriage of the same class of coal over its said line and over another part of its said road from its station of Waverly, and to another of its said stations, viz. Kansas City, in said state, a distance of 63.84 miles 40 cents per ton by the car load, while the distance from said Myrick to said Blackwater was only 60.62 miles for which said rate of 65 cents per ton for said carriage

was fixed, charged, demanded and received of plaintiff as aforesaid, and the same was illegal and exceeded the amount the defendant was entitled to fix, charge, demand and receive for said shipments by the sum of $80.05.

"And the plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge in the sum of $80.05. Wherefore, he prays judgment for the same and for said damages not exceeding $1,000 and for all other and general relief according to the Statute in such case made and provided."

The answer admitted that defendant was a corporation and owned and operated the lines of railway mentioned in the petition, on which it was a common carrier of freight and passengers, and denied generally the other allegations of the petition. It also pleaded specially the unconstitutionality of certain statutes on which it as-
66 sumed the petition was formed. Issue was joint on all these pleas by demurrer and replication.

The cause was submitted to the court on the pleadings and the following stipulation:

"It is hereby stipulated between the parties that the defendant's station, the rates charged by the defendant, and amount of coal transported and the distance set out in the several counts of the petition are correctly stated therein.

"It is further stipulated that in this case the plaintiff in quoting the price of said coal to the several consignees named in the exhibits herein, instead of quoting f. o. b. at Myrick, quoted a price delivered to the consignee's station which quotation was based upon the price at Myrick plus the freight rate charged by the defendant; when the coal was received by the consignees such consignee paid defendant's agent the freight charges and forwarded the receipted freight bill to the plaintiff to be credited on the price of said coal as part payment therefor and then such consignee paid the plaintiff the difference between such freight bill and the quotation price.

"It is further stipulated that such coal was delivered by the plaintiff to the defendant for shipment in the usual and ordinary way without any direction or request by plaintiff as to what particular trains the same must be transported in and that the defendant received and transported the same in the usual ordinary course of business, on the usual train passing over defendant's road.

"It is further agreed that the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this state to points without the same, from points without the same to points within this state and from points without this state through this state to points in other states."

Judgment was rendered for the plaintiff on each count of
67 the petition, aggregating the total sum of $14,308.77, from which this appeal is taken.

I. The statement filed by the appellant in pursuance of the terms of section 280 of the Revised Statutes of 1909 and the rules of this

court was made in pursuance thereof closes with a clear and concise presentation of the issues as follows:

"It is conceded that the rates charged, the distances between the different points and the amount of coal shipped, are as stated by the plaintiff, and the issues of law before this court are:

"1. Whether the plaintiff paid the freight on the several shipments and was in fact damaged as alleged in its petition and is the proper party to bring this action.

"2. Whether, regardless of who in fact paid the freight, the respondent has been damaged and is therefore entitled to recover.

"3. Whether the sections of the statute on which this action is based are constitutional.

"The latter proposition has been decided adversely to the contention of the appellant by this court in prior actions between the same parties, but the question as to whether or not plaintiff can recover for damages, if any, sustained by the consignee who in fact paid the freight, has never been passed upon by this court.

Notwithstanding this frank declaration the appellant has favored us with an elaborate brief upon the constitutional questions raised in the trial of the case which are the same in all respects as those involved in the following cases: McGrew vs. Missouri Pacific Railway Company, 177 Mo., 533; Same vs. Same, 230 Mo., 195; Same vs. Same, 258 Mo., 23; Same vs. Same, 178 S. W. 1179; and McGrew Coal Company vs. the same defendant, 178 S. W. 1179. In each of these the questions were raised by similar pleadings and were presented to the court for determination in the same manner in which they are raised and presented here. They were all against this appellant and
65 in the last case cited this respondent corporation was the plaintiff, and we disposed of it in our opinion with the statement that "the questions presented have all been considered heretofore with great care and at great length, and consistently have been decided against appellant," who is also the appellant in this case. That case was taken by writ of error to the Supreme Court of the United States, where the rights claimed by appellant under the Constitution of the United States were adjudged against it and our judgment affirmed. (Missouri Pacific Railway Company vs. McGrew Coal Company, 241 U. S. 191. For these reasons we must take the appellant at its word, and consider only the unadjudicated question.

II. Has the plaintiff, in contemplation of law, been injured by the exaction of the illegal charge? If so, may he maintain this suit to recover it back? This depends upon the stipulation upon which the case was submitted.

The stipulation stated that the plaintiff, instead of quoting to his customer a price for the coal f. o. b. at Myrick quoted a price delivered at its destination. This means that the coal was sold to the consignee f. o. b. at the station of destination. When the coal was delivered

the purchaser paid the illegal freight bill and settled his account with the plaintiff by sending him the defendant's receipt for the amount of freight paid, with the balance in cash. The transaction of sale stated in the stipulation was a simple one. According to its terms the less the purchaser of the coal paid for freight the more the plaintiff received in net proceeds from the transaction. The more he paid for freight the less the plaintiff received for his coal.

The stipulation states that plaintiff's quotation to the purchaser "was based upon the price at Myrick plus the freight rate charged by the defendant." This is probably true. The value of all commodities is based on all the conditions of cost, including transportation. When the consignee of this coal sold some or all of it to his customer, he no doubt based the price upon the cost of the coal in his yard including the illegal charge paid to the defendant, but this would not transfer the right to bring the suit for the overcharge. We cannot see that the plaintiff stands on any different footing from that upon which it would stand had it paid the freight in advance. While it would, no doubt, then take it into consideration as an element in the selling price of his commodity, that fact would have no effect upon the liability of defendant for the illegal exaction.

This litigation illustrates the just and salutary operation of the rule. The defendant had the physical power to enforce its illegal claim by withholding the delivery. The right of each consumer upon whom the burden ultimately falls to pursue the tortuous course of litigation which has resulted from these transactions would be a barren one. The remedy to be effective, must lie with the shipper with whom the contract is made, and the amount of the recovery measured by the amount which he is, either directly or through his consignee forced to pay. This conclusion is well supported by the authorities.

Southern Pacific Co. vs. Darnell-Taenzer Lumber Co., 245 U. S., 531; Same case 221 Fed. 890; Burgess vs. Freight Bureau, 13 I. C. C. 668; 680; Jennison vs. Railway, 133 Minn., 268; Service & Wright Lumber Co. vs. Railway Co., 67 Oregon, 63, 76; Railroad Co. vs. Manufacturing Co., 51 Ill. App., 151; Audalman vs. Railway, 153 Ill. App., 169; Railroad Co. vs. Crossley, 128 Georgia, 35.

In the foregoing cases as well as in many others which they cite this very point is discussed and expressly determined. We call attention to the Georgia case because it presents the question in a striking light. The rate charged, collected from the consignee, and charged to the consignor, who paid it, was not an illegal rate, nor so far as appears, an unreasonble one. It was simply in excess of a rate made by agreement between the consignor and carrier, and of course liquidated the amount of the excess.

The appellant cites Railroad vs. Coal Mining Company, 230 U. S., 184, to sustain its position in this case. In disposing of that case in its application to this we can do no better than to quote from the opinion of the same court upon the same subject in Southern Pacific Co. vs. Darnell-Taenzer Co., supra, as follows:

"The cases like Pennsylvania R. R. Co. vs. International Coal

Mining Co., 230 U. S. 184, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damages depends upon remoter considerations. But here the plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss. See Meeker vs. Lehigh Valley R. R. Co., 236 U. S. 412, 429; Mills vs. Lehigh Valley R. R. Co., 238 U. S. 273."

We have expressly held the long and short haul provision of section 12 of article 12 of the State Constitution to be self enforcing. (McGrew vs. Railroad, 230 Mo., 496; Same vs. Same, 258 Mo., 2; McGrew Coal Co. vs. Same, 178 S. W. 1179.) It liquidates the amount of the overcharge at the difference between the charge exacted and paid for the shorter haul and the rate charged for the longer haul. If it is wrongfully exacted and paid, it is necessarily the amount to be recovered back. The judgment in this case was rendered accordingly, and is affirmed.

Walker, C. J., and Williams, Blair & Williamson, JJ., concur. Goode & Woodson, JJ., dissent. Graves, J., not sitting.

STEPHEN S. BROWN,
Commissioner.

70 And thereafter, on the 30th day of December, 1919, the following further proceedings were had in said cause, to-wit:

No. 19,150.

McGREW COAL COMPANY, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Comes now the said appellant, by attorney, and files its motion for a rehearing herein.

Which said motion for a rehearing is in the words and figures following, to-wit:

71 In the Supreme Court of Missouri, En Banc, October Term, 1919.

No. 19150.

McGREW COAL COMPANY, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Appellant's Motion for Rehearing.

Now comes The Missouri Pacific Railway Company, appellant in the above entitled cause, and prays the Court to grant it a rehearing in said cause, for the following reasons:

1. Because appellant in its brief duly presented to the Court for

its decision the question as to whether Section 3173, Revised Statutes of the State of Missouri, 1909, and Section 12 of Article XII of the Constitution of Missouri, 1875, were in violation of the Fourteenth Amendment to the Constitution of the United States of America, and the determination of said question would be decisive of this case, but the Court overlooked said question presented by appellant and did not pass upon the same.

II. Because a question duly raised by appellant in its answer in the cause and also presented in its brief on the hearing in this Court has been overlooked by the Court and not decided in the cause, to wit: The question that Section 3173 of the Revised Statutes of the State of Missouri, 1909, and Section 12 of Article XII of the Constitution of Missouri 1875 are in conflict with Section 8 of Article I of the Constitution of the United States.

III. Because the Court failed to pass upon a question duly presented by appellant in its brief, to wit: The question as to whether the Act of 1872 was ever legally adopted by the General As-
72 sembly of Missouri, as required by the Constitution of Missouri, of 1865.

IV. Because the Court failed to consider in its opinion the question as to whether or not the Act of 1872, now Section 3173 of the Revised Statutes for 1909, was repealed by Sections 12 and 14 of the Constitution of Missouri, 1875. Said question was duly submitted to the Court by counsel for appellant in its brief, but not passed upon by the Court.

V. Because the opinion in this case by the Commissioner of the Court, which opinion was adopted by the Court en Banc, in holding that respondent can recover as damages alleged excess charges in freight, whether such charges were paid by respondent or not, deprives appellant of its property without due process of law, and denies to it the equal protection of the law in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

VI. Because the decision of the Court is in conflict with the case of Brannock v. Railroad, 200 Mo. 561, which is a controlling decision of the Court, and which is in direct conflict with the opinion of the Court in this cause.

VII. Because the opinion of the Commissioner, which was adopted by the Court En Banc, in holding that respondent can recover alleged excess charges, without proof of damage sustained by it, is in conflict with the following decisions duly cited by appellant in its brief, to wit:

International Coal Co. v. Railroad, 230 U. S. 184.
Hoover v. Railway Co. 156 Pa. St. 220.
Sharpless v. Lawrence, 213 Fed. 427.
Homestead v. Electric Co., 226 Fed. 23.
Railroad v. Hay Company, 219 Fed. 541.
Railroad v. Spiller, 242 Fed. 1.

73 VIII. Because, under the Court's interpretation of Section 12, Article XII of the Missouri Constitution, holding that said Section of the Missouri Constitution is self-enforcing, notwithstanding said Section 12, Article XII of the Constitution provides: "And suitable laws shall be passed by the General Assembly to enforce this provision," the decision in this case results in a repeal of that portion of Section 12, Article XII of the Missouri Constitution by judicial interpretation, and, in holding that appellant in the exaction of a greater charge for the transportation of freight for a shorter distance than for a longer distance had violated said Section of the Constitution of Missouri, appellant was denied its property without due process of law in violation of Section 30, Article II of the Constitution of Missouri and of the Fourteenth Amendment to the Constitution of the United States.

IX. Because the Court permitted the respondent to recover under the Constitution of the State, Section 12 of Article XII, whereas in his petition he sought a recovery under Section 3173, Revised Statutes of Missouri for 1909, and no recovery is sought in the petition under Section 12, Article XII of the Constitution of Missouri; and, said section of the statute having been held unconstitutional by this court in the case of Sloan v. Pacific Railroad, 61 Mo. 24, ever since said decision the law thereof has become a rule of property in this State, and to permit a recovery by the respondent under the Constitution in a case in which a recovery was only sought in the petition under said unconstitutional section of the Missouri statutes denies the appellant the equal protection and benefit of the laws and due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

74 X. Because this Court in the case of Sloan v. Pacific Railroad (61 Mo. 24) held what is now Section 3173, Revised Statutes of Missouri for 1909 unconstitutional as applied to the charter of the Pacific Railroad of Missouri, to which charter and franchise from the State the appellant in this case has succeeded as a property right, and, by permitting a recovery in this cause under said section of the statute, in view of the transfer and assignment of the charter of the Pacific Railroad Company, as so interpreted in the Sloan case, to the appellant, the decision in this case impairs the obligation of appellant's charter and contract with the State, in violation of Section 15, Article II of the Constitution of Missouri and Section 10, Article I of the Constitution of the United States.

XI. Because the Court erred in holding that appellant was guilty of any discrimination in this case in exacting and putting into effect the statutory rates and charges approved by the Public Service Commission of the State of Missouri, in pursuance of the Public Service Commission Law of 1913, since said statutory rates and charges are the only lawful charges which the appellant could exact from the respondent; and, in holding in this case that the appellant had violated the law in putting said statutory rates and charges into effect, or that the exaction of such rates and charges could result in any

wrongful act on appellant's part, the decision in this case denies the appellant the benefit of the equal protection of the laws and due process of law as applied to all other citizens of the State of Missouri, in violation of the Fourteenth Amendment to the Constitution of the United States.

75 XII. In holding that respondent had a cause of action against appellant by way of discrimination, in view of the admission of respondent that it had not paid the freight in this case, the Court erred, even if there had been a discrimination exacted from the respondent's consignees, for the reason that there must be both a wrongful act and a resulting injury to the plaintiff, and, in holding that this constituted a resulting injury to the respondent, the decision of the Court denies appellant the benefit of the law as interpreted by an unbroken line of decisions in this State, all of which were inadvertently overlooked by the Commissioner and by the Court in adopting the opinion of the Commissioner.

XIII. Because, under the charter granted to the Pacific Railroad Company of Missouri by the Legislature of the State of Missouri in the year 1849 (Act. 1849, P. 219), to whose charter rights appellant has succeeded, the said railroad company was given the right to receive such tolls and freight charges as should be determined by the directors of said company, and said section 3173 of the Revised Statutes of Missouri, 1909, and Section 12 of Article XII of the Constitution of Missouri impair the obligation of the contract which had in 1849 been entered into between the State and the Railroad Company, in violation of Section 10 of Article I of the Constitution of the United States.

XIV. Because the Court erred in adopting as its decision the opinion of Commissioner Brown holding that respondent can recover in this case without proof of any damage sustained by him, and in holding that under the Constitution of the State of Missouri discrimination by railroads has been prohibited in all cases, without regard to whether such discrimination is just or unjust, reasonable or unreasonable, and the decision by the Court in this cause deprives appellant of its property without due process of law and denies to it the equal protection of the law, in violation of Section One of Article
76 XIV. of the Amendments to the Constitution of the United States.

EDWARD J. WHITE,
H. C. CLARK AND
JAS. F. GREEN,
Attorneys for Appellant.

77 And thereafter, to-wit, on the 26th day of January, 1920, the following further proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, in Banc, October Term, 1919.

No. 19170.

McGraw Coal Company, Respondent,

vs.

The Missouri Pacific Railway Company, Appellant.

Now at this day, the Court having considered and fully understood the motion heretofore filed by the said appellant for a rehearing herein, doth order that said motion be, and the same is hereby overruled. (Goode and Woodson, JJ., dissent; Graves, J., not sitting.)

The following is a true copy of the opinion of the Supreme Court of Missouri En Banc, in case of McGraw v. The Missouri Pacific Railway Company, 230 Mo. p. 493, (called for in the praecipe for record herein):

78 William P. Hall, *Special Judge*:

Differences in opinion in Division resulted in the filing of two opinions therein, and in the transfer of the case to Banc. One member of the court having been of counsel in the trial court, only six of the judges sat in the case in Banc, and they dividing equally, a special judge was called in.

This is an action by plaintiff to recover damages from defendant for its violation of the short-haul rule in charging him greater amounts i. e., higher rates per ton, for transportation of freight for certain distances over its railroad than it charged for transportation of freight of the same class for greater distances over said railroad.

Plaintiff owned and operated a coal mine at Myrick, Missouri, on the line of said railroad, and shipped his coal from there to various stations on said railroad in this state. The petition contained thirty-nine counts, covering a great amount of transportation from Myrick to different stations. In each count were stated the quantity in tons of coal transported, the station of destination, its distance from Myrick, the rate per tone charged, the lower rate charged for coal of the same class from Myrick to another station at a greater distance from Myrick on defendant's railroad in Missouri, and the total excess of the charges illegally made for all the coal transported.

In its answer to each count defendant admitted the allegations of fact in the petition as above stated, but it denied that the rate charged plaintiff was illegal for reasons stated. Those reasons were that the rate charged plaintiff had been fixed by the Board of Railroad and Warehouse Commissioners, that the rate from Myrick to the more distant station had also been fixed by said board and had been made by defendant because of the fact that said station was a competitive point, which rendered the conditions and circumstances of

the latter station dissimilar from those of the station to which plaintiff had shipped his coal, and prevented the difference between the two rates constituting discrimination.

The case was tried by the court without a jury.

Plaintiff submitted his case upon the pleadings.

Defendant asked the court to give a declaration of law to the effect that plaintiff was not entitled to a judgment upon the pleadings, and the court refused it.

Defendant offered printed and unauthenticated copies of the reports of the Board of Railroad and Warehouse Commissioners in support of its answer. The trial court rejected same, because of the lack of authentication.

Defendant offered to prove by its general freight agent the reason for the differences in rates complained of by the plaintiff, but the court refused to receive the evidence.

At the close of the evidence, the court gave a declaration of law to plaintiff to the effect that upon the pleadings and evidence the finding and judgment should be for plaintiff.

In accordance with said declaration of law the court rendered judgment for plaintiff on the various counts of the petition for the amount of the excessive charges respectively stated therein, but not for the statutory penalties sued for. The judgment was solely for said excessive charges, and aggregated $7,462.43.

On this appeal by defendant from that judgment, defendant does not urge as error the action of the trial court in rejecting the evidence offered as hereinbefore stated, but assuming that plaintiff's action is entirely founded upon sections 1126 and 1160, Revised Statutes 1899, it seeks to reverse said judgment on the ground that said sections of the statute are invalid, because unconstitutional for various reasons assigned, and because repealed by a subsequent statute.

It is unnecessary at this place to further explain the nature of the objections urged against the validity of said sections; that will be done in the opinion.

Plaintiff's counsel says that said objections were not made in the trial court, and contends that they cannot be made in this court for the first time.

No further statement is deemed necessary at this time.

I. It is, of course, true, as contended by plaintiff's counsel, that an appellant cannot try a case on one theory in the trial court and upon another theory in the appellate court, and that, generally speaking, if a constitutional question is not raised at the trial, it cannot be urged upon appeal.

But where plaintiff's cause of action is founded upon a statute, the constitutionality and life of the statute are involved from the start to the finish, because unless the statute has legal force and effect plaintiff has no cause of action, and defendant, at any time and in any court until the final end of the case, has the right to object that plaintiff's petition does not state facts sufficient to constitute a cause of action for the reason that the statute upon which it is

founded is unconstitutional or has been repealed. Defendant has the right to object for the first time in the appellate court that the petition does not state a cause of action, and it matters not what the ground of objection may be, provided only that it be good and sufficient in law. [R. S. 1889, sec 602, Andrews v. Lynch, 27 Mo. 167; Burns v. Patrick, 27 Mo. 434; Syme v. Steamboat, 28 Mo. 325; Weil v. Greene County, 69 Mo. 281; Wells v. Mutual Benefit, 12 Mo. 639; State ex rel. v. Smith, 141 Mo. 1; State ex rel. v. Smith, 177 Mo. 69, 92; Kaukauna Co. v. Green Bay Co., 142 U. S. 254.]

II. The first objection made to the validity of said sections of the statutes is that the act containing them was not passed in accordance with the provision of the Constitution then in force in relation to the title of laws enacted by the Legislature.

Said sections of the Revised Statutes of 1889 were sections 1 and 4 of an act of the Legislature approved April 1, 1872. Laws 1871, p. 69. Section 1126 was section 1 of said act; section 1160 was section 4.

At the time said act was passed the Constitution of 1865 was in force. Section 32, article 4, of said Constitution provided: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title."

81 The title of said act was: "An act to prevent unjust discrimination and extortion in the rates to be charged by the different railroads in this State, for the transportation of freight on said roads."

Section 1 of said act (now sec. 1126, R. S. 1889), prohibited every railroad company in the State from doing three things: 1. From charging for the transportation of property for any distance over its road any larger amount as compensation, than is charged by it for the transportation of similar quantities of the same class of property over a greater distance over its road. 2. From charging different rates for receiving, handling or delivering freight at different points on its road, or any road used by it in connection therewith. 3. From charging for the transportation of property over any portion of its road a greater amount as compensation, than shall be charged by it for the transportation of similar quantities of the same class of property over any other portion of its road of equal distance.

Section 4 of said act (now sec. 1160, R. S. 1889), merely prescribed a penalty for violating the provisions of the act, and need not be considered further in this connection.

The objection is that the body of the act, i. e., section 1 thereof, was broader than the title.

In support of that objection counsel argue that the title was aimed at unjust discrimination only, whereas the body of the act prohibited every discrimination, just, as well as unjust. They say that the title conceded that there might be just discrimination, but that the body of the act denied such concession. They say that the title was merely declaratory of the common law, which prohibits only unjust discrimination and tolerates just discrimination.

while the body of the act prohibited every discrimination without regard to whether it was just or unjust.

I do not think any of these arguments sound. The body of the act did not prohibit all discriminations; it prohibited only
82 the three discriminations specified therein. It did not prohibit any just discrimination at all; the legislative prohibition was a legislative condemnation of the specified discriminations as unjust and they became unjust by reason of such condemnation. Grant that the title conceded that there might be just discrimination, how did that concession imply that the body of the act would not condemn given discriminations as unjust, and prohibit them under pains and penalties? The common law rule as to discriminations by common carriers is not entirely settled. The courts are not all agreed as to what that rule is. [Interstate Com. Commission v. Railroad, 145 U. S. 263, 275.] But it is conceded that at common law only unjust discriminations are condemned, and that the question as to whether a discrimination is unjust is for the courts to decide. At common law there is no list of specific discriminations condemned as unjust. Every case is to be decided by the court on its own facts.

Counsel's argument, therefore, that the title was declaratory of the common law, is that the title indicated that the act would not declare or define anything to be an unjust discrimination and prohibit it, but that the act would merely "prevent" such things as the courts might decide to be unjust discriminations. If such a thing was capable of accomplishment legally, I do not think that the title can be so construed. The title clearly indicated that the act would prohibit such things as might be declared therein to be unjust discriminations.

If this last argument of counsel's about the title being merely declaratory of the common law be correct, then, under said title, the act legally could probably have contained no provision whatever against discriminations between localities in the State, but its
83 provisions legally would probably have been restricted to discriminations between individuals, for the reason that the common law probably does not require equality between localities. [Beale & Wyman on Railroad Rate Regulation, sec. 831.] These authors say in part, speaking of the common law: "While discrimination in rates between individuals is illegal, even if the higher rate is reasonable in itself, this is not true as to discrimination between localities. If a general rate charged to all shippers in a certain place is reasonable in itself it is not rendered unlawful merely because shippers in another place are charged a lower rate."

A contrary view seems to be expressed in C. & A. Railroad v. People, 67 Ill. 11, but the view of said authors appears to be sustained by Interstate Com. Com'n v. R. & O. Railroad, 145 U. S. 263, 275, supra, where it is said in part that prior to the enactment of the Interstate Commerce Act the principles of the common law demanded little more than that common carriers "should carry * * * in the order in which the goods were delivered at the

particular station, and that their charges for transportation should be reasonable," and that "it was even doubtful whether they were bound to make the same charges to all persons for the same service; though the weight of authority in this country was in favor of equality of charge to all persons for similar services."

If, therefore, the contention of defendant's counsel in this respect is correct, and if the common law forbids only unjust discrimination between individuals, and not between localities at all, then logically it would follow, as stated, above, that the word "discrimination" in the title of said act referred only to discrimination between individuals, and that the act legally could not have prohibited any discrimination between localities.

Indeed this view was suggested in one of the opinions in Division.

84 It was suggested in said opinion that the things prohibited by the act are not discriminations at all. This view is not sound.

The entire subject of discrimination by railroads is one of very recent growth. This is true of discrimination between individuals as well as of discrimination between localities. On account of the uncertainties and the insufficiencies of the common law upon the subject, many of the states have adopted and enacted laws, constitutional and statutory, prohibiting and regulating discriminations, both local and individual. It is said that in more than twenty-eight states local discrimination is now forbidden. [Beale & Wyman on Railroad Rate Regulation, sec. 1211.] It is entirely clear that courts, law-writers, legislatures and constitutional conventions speak of discrimination between localities in the same sense that they do of discriminations between persons. And I am entirely clear that the word "discrimination" in said title applied to local as well as individual discrimination, and included what is known as a short-haul regulation.

The title was not declaratory of the common law.

It is, of course, not disputed that, under such a constitutional provision as that of the Constitution of 1865, the body of an act must not be broader than its title. As said by Judge Cooley, the title is the conclusive index to the legislative intent. And accordingly it has been held by this court, that, under a title, "An Act to change the penalty for disturbances of the peace," the Legislature could not make that a disturbance of the peace which was not previously such an offense. This case has been urged quite vigorously by defendant's counsel in support of their contention. But there was nothing in the title of the Act of 1872 to indicate a purpose to merely provide penalties for discriminations. The words of the title, "An Act to prevent unjust discriminations," etc., cannot be restricted to the mere imposition of penalties, but clearly

85 extend to the prohibition of things as well as to the imposition of penalties for doing the things. And there is nothing in said words restricting the body of the act to existing unjust discriminations.

The title was broad enough to include every unjust discrimination, whether unjust in law prior to the enactment or not, and

broad enough to authorize the Legislature to declare unjust discriminations which previously had been tolerated under the law. The provisions of the act made the things prohibited unjust discriminations, and thus said provisions were fully covered by the title.

This must be true unless the words of the title be held to have intended to make the question as to whether a discrimination is unjust a judicial question, and to restrain the Legislature in said act from declaring any discrimination unjust. This is but another way of stating counsel's contention hereinbefore already stated. There is nothing in the words of the title from which such intention can be inferred.

In my opinion the body of the act in no sense can be said to be broader than its title. The title indeed is broader than the body of the act. The title applies to and includes every unjust discrimination, while the body of the act covers only three specified acts of unjust discrimination.

Said act, title and all, was substantially a copy of a statute of Illinois enacted in 1871. The only difference between the two was in the penalties imposed. The Illinois statute provided for a forfeiture of the franchises of the guilty railroad company, while our act did not. This difference is immaterial here.

The Supreme Court of Illinois in 1873, after our Act of 1872 had been enacted, decided that the Illinois statute was unconstitutional (C. & A. Railroad v. People, 67 Ill. 11), and that decision is urged as strong and persuasive, though not controlling au-
86 thority, in support of the objection now under consideration.

But in that case it was not decided that the Illinois statute was unconstitutional on account of any defect in its title. The invalidity was placed upon entirely different and broader grounds. The Constitution of Illinois contained a provision which the court construed to restrict the power of the Legislature to prohibit discriminations to those which are unjust, and to make the question of the injustice of any alleged unjust discrimination a judicial question to be decided by the courts. The court held that under that constitutional provision the Legislature had no power to declare anything to be an unjust discrimination, that the Illinois statute did declare the prohibited things to be unjust discrimination, and, therefore that said statute was in conflict with the Constitution, and void. In discussion the court said that the Legislature had power to prohibit only unjust discriminations, and that said act prohibited both just and unjust discriminations, but the gist of the decision was as just stated, to-wit, that the constitutional provision made the question of the injustice of every discrimination a judicial question, to be decided by the courts and not by legislative enactment. Nothing was said by the court about the title of said statute, except that in the course of argument the court remarked that said title indicated the purpose of the Legislature to follow the Constitution and to prohibit unjust discriminations only, but that the statute had gone further. The point was not made in that case, nor did the court intimate that the title was defective

because not broad enough to cover the provisions of the statute, upon the assumption that the Legislature of Illinois had the power to declare the things mentioned therein to be unjust discriminations. The inference is quite strong that all parties concerned thought the question involved in said case to be one of power on
87 the part of the Illinois Legislature, and not of form or mode of executing said power.

There is nothing in that case, in my opinion, opposed to the conclusion hereinbefore stated, that the title, "An Act to prevent unjust discrimination," etc., is broad enough to include all things which the Legislature may legally prohibit as unjust discrimination.

At the time of the passage of our Act of 1872, the Constitution then in force contained no provision limiting the power of the Legislature to prohibit discrimination by railroads.

III. Defendant's counsel next object that if the Act of 1872 was not unconstitutional as passed, it subsequently became unconstitutional upon the adoption of our present Constitution in 1875, for the reason that the provisions of said act are in conflict with certain provisions of said Constitution.

If said act is in conflict with said Constitution, it became inoperative upon the adoption of the Constitution. Section 1 of the schedule which forms a part of that Constitution so provides.

The constitutional provisions referred to as the basis of said objection constitute section 14 of article 12 of our present Constitution, and read as follows:

"Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers. The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties."

Those provisions were borrowed literally from the Illinois
88 Constitution of 1870, and it was those provisions that the Supreme Court of that State, in 1873, in C. & A. Railroad v. People, 67 Ill. 11, construed to limit and restrict the power of the Legislature to prohibit discriminations by railroads and other common carriers, to those discriminations which are unjust, and to make the question of the injustice of any alleged unjust discrimination a judicial question to be decided by the courts.

It is urged that we adopt the provisions with the construction that had been placed upon them. The general rule is that where one state borrows a constitutional provision from another state that had previously been construed by the courts of the latter state, such construction is presumed to have been adopted along with the provision. The reason for said rule is that if it were intended to exclude the previous construction, the legal presumption is that

the terms of the provision would be so changed as to effect that intention. [Com. v. Hartnett, 3 Gray (Mass.) 450; Pennock v. Dialogue, 2 Pet. (U. S.) 1; Hogg v. Emerson, 6 How. (U. S.) 483.] And if we had adopted those provisions of the Illinois Constitution alone without more, there would have been great force in the contention that the effect of it was to repeal the Act of 1872, although it is apparent that the question even then would have been quite different from that which would have been presented had we first adopted said constitutional provisions, and afterwards enacted the Act of 1872. In the latter contingency, the presumption would have been very great that by adopting said constitutional provisions it was our intention to prevent the enactment of such an act as the Act of 1872, and to prevent the Legislature from defining unjust discrimination, and to permit it to prevent only such discrimination as the courts might decide to be unjust. But the Act of 1872 was enacted before our adoption of said constitutional provisions and said act was within the power of our Legislature at the
89 time of its enactment, and it declared specific acts of discrimination to be unjust and unlawful; and had said constitutional provisions, standing alone, been adopted by us, the question then would have been as to the effect of the use of the word "unjust" in said provisions to set aside the policy of this State as declared in said act, and to repeal it because declaring specific acts of discrimination unjust without regard to the decisions of the courts thereon. It is clear that the two questions suggested here are not identical, and that they would not necessarily require the same answer. In the one case the presumption would be much greater than in the other.

But we did not adopt those constitutional provisions alone. Not only did we adopt as a part of our present Constitution said provisions which annulled the Illinois statute, that had enacted the short-haul rule, but we also adopted the very gist of that statute, i. e., the short-haul rule itself, and wrote that very rule into our Constitution, making it section 12 of article 12 thereof. Said section reads as follows:

"It shall not be lawful in this State for any railway company to charge for freight or passengers a greater amount, for the transportation of the same, for a less distance than the amount charged for any greater distance; and suitable laws shall be passed by the General Assembly to enforce this provision; but excursion and commutation tickets may be issued at special rates."

That action was most significant. The Illinois court had decided in 1873 that the Illinois statute prohibited all discrimination by railroad companies in the transportation of freight in any direction, the same or not; under any circumstances or conditions, similar or dissimilar; and whether just or unjust in the opinion of the courts. The convention that framed our Constitution of 1875, with that decision before it, took the gist of that statute and inserted it
90 into our Constitution, establishing the short-haul rule, but extending it to the transportation of passengers as well as that

of freight. That action is consistent only with the intent on the part of the convention that framed the Constitution, to establish the short-haul rule in this State as a part of its fundamental law.

Moreover, in 1873, Pennsylvania had adopted a new constitution, a section of which prohibited undue or unreasonable discrimination in charges or facilities for the transportation of passengers or freight, and provided that "persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class, in the same direction, to any more distant station." [Article 17, sec. 3.] Two years afterwards when we framed our present Constitution, with the recent constitutions of both Illinois and Pennsylvania before us, we took the short-haul rule, but we worded it in our own way, following in a general way the Illinois Statute, ignoring the limitations in the Pennsylvania Constitution restricting the rule to hauls in the same direction, and making it apply to hauls in the same or the opposite direction.

Since 1875 other states have adopted constitutions making a short-haul provision a part of them. Said states are Arkansas, California, Kentucky, Montana, Oklahoma, South Carolina, Virginia, and Washington. In none of them is the short-haul rule stated so broadly or unconditionally as in our Constitution. In most of them the haul must be in the same direction, in some of them under the same or like conditions and circumstances, and in not a few of them some state commission is authorized to grant relief from the rule on a proper showing.

The language of our Constitution, so widely different from all the others in these respects, was not a mere accident, but indicates a fixed and settled purpose and intention to establish a rigorous
91 and unalterable and unvarying short-haul rule as the policy of the State.

The effect of making the short-haul rule a part of our Constitution was to exclude the construction by the Illinois Supreme Court of the Illinois constitutional provision borrowed by us.

The two sections of our Constitution should be read together in determining their meaning, their purpose and their effect. We should also consider the condition of the law at the time we adopted said Constitution. At that time the Constitution of 1865 was in force. That Constitution, as hereinbefore said, contained no restriction upon the power of the Legislature over discrimination in railroad rates, and under that Constitution, said power was unlimited unless restricted in some manner by the Constitution of the United States. "The governments of the states possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions" of the states. The state constitutions are not grants of power, but are restrictions on the powers which the state government would otherwise possess. [Munn v. Illinois, 94 U. S. 113; State v. Tower, 185 Mo. 79; Ex parte Roberts, 166 Mo. 207, 212; State ex rel. v. Sheppard, 192

Mo. 497, 506; Ex parte Berger, 193 Mo. 16.] The legislature of a state possesses all legislative power except as restricted by the provisions of the Constitution of the United States or of the Constitution of the state. This fundamental rule of our state governments is declared by section 1 of article 4 of our present Constitution in the provision: "The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives to be styled 'The General Assembly of the State of Missouri.'"

In State v. Tower, 185 Mo. 79, this rule is stated,
92 and it is said that under said rule "the Legislature has the power to declare places or practices * * * public nuisances, although not such at common law," that is, to "declare that a nuisance which before was not a nuisance."

The regulation of railroads is within the legislative power of the state. [Beale & Wyman on Railroad Rate Regulation, secs. 1301-1306; Munn v. Illinois, supra; C., B. & Q. Railroad v. Iowa, 94 U. S. 155; Peik v. Railroad, 94 U. S. 164.] It was in the exercise of that power that the Legislature passed the Act of 1872.

Sections 12 and 14 of said article of our Constitution when read together, as they should be, leave no doubt of the intention of its framers to adopt the short-haul rule, and to put it in operation in this State. Such intention, as hereinbefore stated, is clearly manifested in section 12, and there is nothing in section 14 indicating a contrary intention. The language of the latter section that is supposed to indicate a contrary intention is that which directs the Legislature to pass laws "to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs in this State." It is argued that an implied restriction arises from that language limiting the power of the Legislature to prevent only such discrimination as is unjust, that it could not have been intended to thus restrict the power of the Legislature in section 14, and in section 12 to have empowered the Legislature to enforce the short-haul rule not only where it is just to do so, but also where it is unjust to do so, and, therefore, that said implied restriction should be extended to section 12 and applied to it as well as to section 14.

The implied restriction upon the power of the Legislature thus sought to be enforced, arises from language in section 14 which refers to discrimination generally, whereas the short-haul rule estab-
93 lished by section 12 applies to a particular class of discrimination, and is specifically established in positive and explicit terms. If there is any inconsistency between the two sections in the respect under consideration, the specific class of discrimination treated of in section 12 must be regarded as withdrawn from the provisions of section 14 relating to discrimination generally, and the positive and explicit terms of the former section cannot be restrained by such implication arising from the subsequent general words of the latter section.

The following statement of the established rule as to the controlling effect of a particular enactment over a general enactment, in the construction of statutes, fits this case: "It is an old and familiar rule that where there is in the same statute a particular enactment and

also a general one, which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative and the general enactment must be taken to affect only such cases within its general language as are not within the provision of the particular enactment." [26 Ency. Law (2 Ed.), 629.] Generally "if two provisions are irreconcilably repugnant, the last in order of time and local position will be preferred," but this general rule gives way where the first provision is particular and the last one is general. In such case an exception is made, and the particular intent prevails. [8 Cyc. 743.] In speaking of the effect that positive and explicit provisions have to deny an implication from subsequent words, Mr. Chief Justice Marshall said in Faw v. Marsteller, 2 Cranch (U. S.) 10: "In searching for the literal construction of an act it would seem to be generally true that positive and explicit provisions, comprehending in terms a whole class of cases, are not to be restrained by applying to those cases an implication drawn from subsequent words unless that implication be very clear, necessary and irresistible."

94 If there is any implied restriction upon the power of the Legislature over discrimination in railroad rates, arising from the general provisions of section 14, the short-haul rule, established specifically by the positive and explicit provisions of section 12 must be excepted from said implied restriction.

But no such implied restriction arises from the provisions of section 14.

The construction of the language of said provisions by the Illinois court was rejected by us, and rejected in toto, and those provisions should be construed in the light of the general rules that govern in the construction of constitutional provisions.

Constitutional limitations upon the legislative power may be made, it is true, either expressly or by implication, but the implication must at least be clear and strong and convincing (Danville v. Pace, 25 Gratt. 9; Whitlock v. Hawkins, 105 Va. 242, 248), if not absolutely necessary (Cooley's Const. Lim. [6 Ed.] 201, 204).

If section 14 of article 12 be construed in the light of that rule, and of the fundamental rule that the provisions of a State Constitution are not grants of power, but limitations of power, there can be no serious doubt about its meaning.

That portion of said section that relates to the subject of discrimination reads as follows: "The General Assembly shall pass laws to * * * prevent unjust discriminations * * * in the rates of freight and passenger tariffs on the different railroads in this State."

Those words are a mandate to the Legislature to prevent unjust discriminations in railroad rates, and are not a limitation upon its power to prevent such discriminations as it may deem proper to prohibit. A constitutional command to the Legislature to do one thing is not a denial of its power to do other things.

95 In Evers v. Hudson, 36 Mont. 135, it was held that a constitutional provision requiring the Legislature to establish free common schools is a mandate to the Legislature to establish such schools, and is not a limitation upon the power of the Legis-

lature to establish other schools. The court said that the provision "is not a limitation upon the legislative power, but is a solemn mandate to the Legislature."

In State v. Fountain, 69 Atl. 926 (Del. Gen'l Sess. 1908), it is held that a constitutional requirement that certain questions shall be submitted by the Legislature to a vote of the people, is not a limitation upon the power of the Legislature to submit other questions to a vote of the people.

To the same effect is the separate concurring opinion of Justice Willard in Barto v. Himrod, 8 N. Y. (4 Seld.) 483, 493, in which he said: "And I do not mean to lay much stress upon the implication arising from the express provision to submit a law creating a debt to the people, and the silence of the Constitution in relation to submitting to the people other matters of legislation. The maxim, expressio unius est exclusio alterius, is more applicable to deeds and contracts than to a constitution, and requires great caution in its application in all cases."

The Constitution of Pennsylvania provided: "The Legislature shall, as soon as conveniently may be, provide by law for the establishment of schools throughout the State, in such manner that the poor may be taught gratis." An act of the Legislature establishing a school system was attacked on the ground that it violated that provision of the Constitution. In answer to the objection raised, Chief Justice Black, who wrote the opinion of the court, pointed out the fundamental difference between the Constitution of the United States and the constitutions of the states, i. e., that the former is a grant of powers, while the latter are limitations of power, and, after quoting the above section of the State Constitution, added:

"It seems to be believed that the last clause of this section is a limitation to the power of the Legislature, and that no law can be constitutional which looks to any other object than that of teaching the poor gratis. The error consists in supposing this to define the maximum of the legislative power, while in truth it only fixes the minimum. It enjoins them to do thus much, but does not forbid them to go beyond it."

In Williams v. Mayor of Detroit, 2 Mich. 560, 563-564, the court said that though the maxims expressio unius est exclusio alterius and expressum facit cessare tacitum generally apply to the construction of all instruments and laws, there are certain laws to which the maxims cannot be strictly applied without doing violence to the plain intent of the framers of the laws, and that this is especially true in the construction of state constitutions, owing to their character and objects, which the court explained at some length, and then, to effect, said that the imposition by the Constitution upon the Legislature of certain specific duties, limitations, restraints and regulations in certain important particulars, binds the Legislature, of course, in those particulars, but that notwithstanding that, all other acts properly pertaining to the legislative power of the state are within the competency of the legislative department, and binding upon the people.

The maxims mentioned in the case last cited have been, by all

who make it, counsel and members of this court, invoked as the chief support for the contention that said portion of section 14 limits the power of the Legislature. But these maxims are not rigid rules of unvarying and universal application; they are merely rules adopted for the construction of written words, and like all such rules, are intended to be used for the purpose of ascertaining the true meaning of the words, in order that the purpose intended may be accomplished, and should never be permitted to be used to obscure that meaning or thwart that purpose. [Lexington v. Commercial
97 Bank, 130 Mo. App. 687, 692; McFarland v. Railroad, 94 Mo. App. 336, 342; Brown v. Buzan, 24 Ind. 194, 198; Scott v. Laporte, 162 Ind. 34, 54; Multnomah County v. Guarantee Co., 46 Ore. 523 537; State v. Houghton, 142 Ala. 90, 97; Wheeling Railroad v. Railroad, 72 Ohio St. 378, 385; Swick v. Coleman, 218 Ill. 33, 40; Helm v. Grayville, 224 Ill. 274, 278-279; Portland v. Tel. Co., 103 Me. 240, 249; Campbell v. Skinner Mfg. Co., 53 Fla. 632, 640; Endlich on Interp. Stat., secs. 308-309, 333 and 335; 1 Story on the Const. (4 Ed.), sec. 448; Potter's Dwarris on Stats. and Consts. p. 48; 26 Ency. Law (2 Ed.), 604; Jameson, Const. Conv. (4 Ed.), sec. 374; Brown's Legal Maxims (7 Am. Ed.), p. 653; Saunders v. Evans, 8 H. L. Cas. 729; Eastern Archipelago Co. v. The Queen, 2 El. & Bl. 878, 879; Hon. Joel Parker, 16th Mass. Conv., 1853, vol. 1, p. 153.]

In 1 Story on the Constitution (4 Ed.), sec. 448, in speaking of said maxims, Judge Story says: "These maxims, rightly understood and rightly applied, undoubtedly furnish safe guides to assist us in the task of exposition. But they are susceptible of being applied, and indeed are often ingeniously applied, to the subversion of the text and the objects of the instrument. Thus it has been suggested that an affirmative provision in a particular case excludes the existence of the like provision in every other case, and a negative provision in a particular case admits the existence of the same thing in every other case. Both of these deductions are, or rather may be, unfounded in solid reasoning. Thus it was objected to the Constitution that, having provided for the trial by jury in criminal cases, there was an implied exclusion of it in civil cases. As if there was not an essential difference between silence and abolition, between a positive adoption of it in one class of cases and a discretionary right (it being clearly within the reach of the judicial powers confided to the Union) to adopt or reject it in all or any other cases.
98 One might with just as much propriety hold that because Congress has power 'to declare war,' but no power is expressly given to make peace, the latter is excluded; or that, because it is declared that 'no bill of attainder or ex post facto law shall be passed by Congress, therefore Congress possesses in all other cases the right to pass any laws. The truth is that, in order to ascertain how far an affirmative or negative provision excludes or implies others, we must look to the nature of the provision, the subject-matter, the objects and the scope of the instrument. These, and these only, can properly determine the rule of construction."

Lord Chancellor Campbell said in Saunders v. Evans, supra, that

said maxims are not of universal application, but depend upon the intention of the parties as discoverable upon the face of the instrument or of the transaction.

Judge Parker said in the Constitutional Convention of Massachusetts of 1853, supra: "I do not understand the principle to be that the mention of one mode excludes all other modes which would have existed but for the mention of that mode."

These authorities fully sustain my construction of the portion of said section 14 of the Constitution quoted above. That portion of said section was not intended as a grant of power to the Legislature to prevent discrimination in railroad rates, the Legislature already possessed that power; but the Legislature, with the single exception of the Act of 1872, had never exercised it, and that part of said section was adopted as a command to the Legislature to further exercise it, and to enact laws to prevent all unjust discriminations in such rates. The use of the word "unjust" was not made to limit the power of the Legislature in that regard, but to require the exercise of said power. It was not intended by said word to deprive the Legislature of the power of determining by statute what should be unjust discrimination, and to make that a judicial question for the decision of the courts, which otherwise the Legislature could have finally settled, but it was intended to require the Legislature to act, and to declare what should be unjust discrimination. The action of the Legislature was still to be final and conclusive, just as it would have been before, and discrimination which the Legislature should prohibit, in the meaning of that section of the Constitution, would be unjust and illegal.

On the other hand, if the Legislature should enact that any given discrimination might be practiced by the railroads except that prohibited by section 12 of said article, such discrimination would be legal, and the courts could not declare it unlawful on the ground that it was unjust, and therefore prohibited by the provisions of said section 14.

It is suggested that the clause of said section 14 that requires the Legislature to pass laws establishing reasonable maximum rates for railroads is against the above conclusion, for the reason that said clause clearly was intended not only to require such legislation, but also to limit the power of the Legislature in that regard to fixing rates that are reasonable, and to prohibit it from fixing rates that are below what are reasonable; and that if such limitation and prohibition were intended in relation to rates, like limitation and prohibition were intended as to discrimination, and that the Legislature cannot prevent just discrimination any more than it can prevent reasonable rates.

I do not think that section 14 can be construed to limit or restrict the power of the Legislature in regard to rates. That section clearly was intended to require the Legislature to fix such maximum rates for railroads as it might deem reasonable, and there was no intimation contained in said section that the reasonableness of the rates fixed by the Legislature should be a judicial question to be determined by the courts. At common law common carriers are required to make reasonable charges, and extortionate

charges can be restrained by the courts, and at common law, therefore, the reasonableness of charges is a judicial question, but the State in its sovereign capacity has the power to fix rates and to authorize them to be charged, and to place them beyond the power of the interference of the courts on the ground that they are extortionate. Statutory rates, except for some constitutional or statutory provision so authorizing, cannot be adjudged by the courts to be extortionate. Rates established by the Legislature under said section 14 cannot be adjudged extortionate by the courts.

There are constitutional limitations upon the power of the Legislature to regulate rates, but they are not found in said section 14.

It is now firmly established that the provision of the Fourteenth Amendment to the Constitution of the United States that forbids the taking of private property without due process of law, prohibits the State from confiscating the use of the property of any public service corporation by fixing rates so low as to deprive such corporation of reasonable compensation for such use, and that the reasonableness of the compensation is a judicial question. [Chicago, etc., R. R. v. Minnesota, 134 U. S. 418; Chicago, etc., R. R. v. Wellman, 143 U. S. 339; Reagan v. Trust Co., 154 U. S. 362; St. Louis, etc., R. R. v. Gill, 156 U. S. 649; Covington Turnpike Co. v. Sandford, 164 U. S. 578; Smyth v. Ames, 169 U. S. 466; San Diego Land Co. v. National City, 174 U. S. 739; Cotting v. Stock Yards Co., 183 U. S. 79; Stanislaus County v. San Joaquin Co., 192 U. S. 201; Ex parte Young, 209 U. S. 123; Knoxville v. Knoxville Water Co., 212 U. S. 1; Willcox v. Consolidated Gas Co., 212 U. S. 19.]

In all of those cases the plenary power of the State to reg-
101 ulate the rates of public service corporations is fully recognized, but it is held that such power is so limited and restricted by said provision of the Federal Constitution that, in the exercise of it, the State cannot take the use of the property of such a corporation for the public without just compensation, and in all those cases it is conceded that the rates established by the State, subject to that exception, are controlling and beyond the interference of the courts. The patrons of the public service corporation cannot complain that the statutory rates are too high. In that regard the reasonableness of the rates is conclusively established by legislative enactment. The corporation is not bound by the established rates simply because it has the right to receive reasonable compensation for the use of its property under a requirement to that effect by the Federal Constitution, and the right to a decision of the courts as to whether that requirement has been complied with. Just as the question of the reasonableness of the compensation in all cases where private property is taken for public use, is a judicial question, and regardless of the form of the proceeding in which said question arises, the proceeding is judicial and removable as such to the Federal courts. [Madisonville Traction Co. v. Mining Co., 196 U. S. 239; Mason City R. R. v. Boynton, 204 U. S. 570.] But except for that constitutional requirement, the reasonableness of such rates is purely a legislative question.

A like restriction, of course, is imposed upon the power of the Leg-

islature to establish rates by sections 20 and 21 of article 2 of our Constitution, which prohibit the taking of private property without just compensation, and section 30 of said article, which provides that no person shall be deprived of his property without due process of law. What has just been said about the restriction upon such power imposed by the Federal Constitution applies to these
102 provisions of our own Constitution. Their effect is to make the reasonableness of such rates a judicial question only when the rates are attacked by the corporation as confiscatory.

The constitutional limitations mentioned cannot be held to protect railroad companies in making any given discriminations prohibited by the Legislature, on the ground that they are just, unless it can be maintained that the refusal of the State to permit said discriminations is in effect the confiscation of the railroads or of the use thereof. It is perfectly clear that no such position can be maintained. It is not such confiscation for the State to establish and enforce a uniform and rigid rule of equality in rates between all individuals and localities, without exception and regardless of differences in conditions. Such a rule may be unwise, and may result in inconvenience and injustice, and may even destroy and prevent, in many instances, the equality sought to be enforced by the rule itself. But in no sense is it the taking of the property of the railroads.

Therefore, if section 14 of said article of the Constitution stood alone, and not with section 12, I should hold that it created no limitation upon the legislative power of the State.

Mention, however, should be made of the case of W. U. Tel. Co. v. Pub. Co., 44 Neb. L. c. 335, wherein a constitutional provision similar to that of Illinois was given the same construction as that given by the Illinois court. The Nebraska court held that had there been no such provision in the Constitution of that State, the Legislature would have had power to prevent any discrimination, but that said provision, on the principle of the maxim, expressio unius, etc., must be held to limit the power of the Legislature to the prevention of unjust discriminations, that is to say, to discriminations adjudged by the courts to be unjust. For the reasons
103 heretofore given I am of the contrary opinion.

But the two sections must be construed together, and construed together there is no doubt about the matter, in my mind.

There is nothing in the opinion of Judge Napton in Sloan v. Pacific Railroad, 61 Mo. 24, inconsistent with any of the views expressed herein. There is not even a dictum contained in said opinion against any of these views. The only point decided in that case was that the railroad company had a valid contract authorizing it to regulate its rates until a fixed date that had not yet arrived. What is supposed to be a dictum against the power of the Legislature to enact the Act of 1872 against railroads generally is the expression of Judge Napton: "The Act of 1872 undertakes to define the obligations of railroad companies and to declare that a charge for one distance, if it exceeds a charge for a longer one, is an unjust discrimination. It may be so; but whether it is or not, is a question for

the courts to decide and not the Legislature. The Act of 1872 declares that such discrimination is an unjust one, without regard to any circumstances whatever." That expression should not be read separate and apart from its context. The very next words of Judge Napton show that he meant to say that the common law rule declared by him in said expression, and not the Act of 1872, was in force as to the Pacific Railroad Company because of said contract. Continuing, Judge Napton said: "In other words, the Legislature, by this act, assumes a power which the charter had originally granted to the company, and which the Act of 1868 had continued to confide in the company for ten years after the passage of that act, and the only question is whether the Act of 1868, under which this road is now held, is a valid act; for if it is, then primarily, the de-
104 fendant is invested with the power to fix its rates of freight and passage, subject to such police regulations as the State always retains power to make." Judge Napton then proceeded to discuss the question of the police power of the State as affected by said contract, and in effect held that the Legislature could not, as against the Pacific Railroad, until after the expiration of said contract, abrogate the principles of the common law applicable to discrimination by railroad companies. He said that any citizen had the right to hold the company liable for unjust discrimination, but that the Legislature had no power to pronounce unjust certain discriminations made by the company, because of said contract with the company, and in conclusion said: "An arbitrary rule was adopted by the Legislature determining that certain rates were unjust. Whether they were so or not was a matter depending on circumstances, of which the Legislature were not made judges. The liability of the defendant at common law and on general principles not abrogated by the Legislature [because of said contract], was a matter for the determination of courts of justice with the aid of juries." There was in all this no intimation that had there been no contract, the Pacific Railroad would not have been bound by the Act of 1872, or that the Legislature was without power to enact it.

I have not considered the policy of the Act of 1872. Because it must be axiomatic in every government existing under a written Constitution, that every rule clearly established by the Constitution ought to be enforced by the courts in its true spirit without regard to their opinion of the wisdom of the rule. The people make the Constitution. They alone can amend or repeal it, and the courts would interfere with the people's prerogative were they by unfriendly construction to limit or hinder the enforcement of any consti-
105 tutional rule according to its true spirit. Courts have said that such a construction of a constitutional provision should not be made as would lead to unjust and inequitable consequences, or to a manifest absurdity. [Fusz v. Spaunhorst, 67 Mo. 256.] But where the meaning of the constitution is plain and unequivocal, and its intention clear and unmistakable, the courts have nothing to do with the policy of the rule established, and they should accept the spirit of the rule as well as its letter, and enforce it as if they believed in its wisdom. There should be no half-hearted support of the Consti-

tution or half-hearted enforcement of its commands by the courts. The mandates of the constitution should be regarded by the courts, established under its provisions, as sacred, and should be enforced zealously. This court has said, in speaking of the power of the courts to construe constitutional provisions: "In exercising that power the courts should take a large and comprehensive view of constitutional language, mindful that 'every scripture is to be interpreted by the same spirit which gave it forth,' and with a deep desire to enforce its full and exact meaning." [Wells v. Railroad, 110 Mo. l. c. 297.]

In Hills v. Chicago, 60 Ill. 86, 91, the court said: "When a particular act is inhibited by the clear and unambiguous language of the Constitution, the policy of such inhibition, or the inconvenience that may ensue from its enforcement, is a matter with which the court has no concern; its duty is simply to reverently recognize and faithfully enforce."

IV. It is next insisted that the Act of 1872, and section 12 of article 12 of our Constitution, construed as above, are in conflict with article 5 and section 1 of article 14 of the amendments to the Constitution of the United States.

The Fifth Amendment relates only to acts of Congress, and therefore is not in point.

106 Something was said in the preceding paragraph hereof in relation to the due process of law required by the Fourteenth Amendment, but something further should be said upon the subject. Defendant's counsel contend that the railroads have the same constitutional right to a decision of the courts upon the question as to what is just discrimination that they have upon the question as to what is reasonable compensation for property taken for public use or for the use of property already devoted to the public use.

In L. & N. Railroad v. Kentucky, 183 U. S. 503, the Supreme Court of the United States denied a like contention, and held that, in the absence of a valid agreement protecting it from interference on the part of the State in this regard (if indeed such an agreement could be made, which was not decided), a railroad company has no constitutional right to discriminate either between individuals or localities, and that the State has the constitutional power to prohibit absolutely all such discriminations. In small part the court said: "It is said that, while it is true that railroad companies receive their right to exist and to maintain their roads from the State, yet their ownership of such roads is property, and, as such, is protected from arbitrary interference by the State. But though it be conceded that ownership in a railroad is property, it is property of a kind that is subject to the regulations prescribed by the State. * * * What we now say is that a state corporation voluntarily formed cannot exempt itself from the control reserved to itself by the State by its Constitution, and that the plaintiff in error, if not protected by a valid contract, cannot successfully invoke the interposition of the Federal Courts, in respect to the long and short-haul clause in the State Constitution, on the ground simply that the railroad is property. Nor is there any foundation for the objection that the pro-

vision in question denies to the plaintiff in error the equal protection of the laws. The evil sought to be prevented was the use of
107 public highways in such a manner as to prefer, by difference of rates, one locality to another, and the remedy adopted by the State was to declare such preferences illegal, and to prohibit any person, corporation, or common carrier from resorting to them. * * * The practical inefficiency of this remedy to reach the desired end, and the resulting injury to the welfare of both the producers and the consumers of an article like coal, when brought into competition with coal brought from without the State, are strongly urged on behalf of the plaintiff in error; but however well founded such objections may be, they go to the wisdom and policy of the enactment, not to its validity in a Federal point of view. The people of Kentucky, if it can be shown that their laws are defective in their conception or operation, have the remedy in their own hands." [183 U. S. 513-514.]

The court expressly denied that the doctrine established in a long line of its decisions, that a State cannot deprive a public service corporation of the use of its property under the guise of unreasonable rates, has any application to this objection. [183 U. S. 510-511.] It recognized the power of a state absolutely to prohibit all and every kind of discrimination, saying that the provision in the laws of Kentucky authorizing the exoneration of carriers from the operation of the law on certain conditions was ex gratia. [183 U. S. 515.]

V. It is next objected that the Act of 1872 was repealed by the Act of 1887, and therefore that the former act is without force or effect, even if it was valid as passed, and not afterwards invalid because violative of section 14, article 12 of our present Constitution.

This is the question upon which Court in Banc divided. I approached its consideration with diffidence on that account, but
108 the conclusion reached, in my opinion, is reasonably free from doubt. The only doubt I have is due to the difference among the members of the court upon the question.

In a former suit between these same parties it was decided in Division that the Act of 1872 was not repealed by the Act of 1887. [McGrew v. Railroad, 177 Mo. 533.] The correctness of that decision is now to be decided by the court.

The general rules that prevail in determining whether a given statute has been repealed by a later one upon the same subject have little to do with the determination of the question here, for the reason that the act of 1887 contained a section declaring its purpose and effect as related to other laws then in force. Section 21 of said act is as follows: "This act is not intended to repeal any law now in force, unless in direct conflict therewith, but is intended to be supplemental to such laws."

Said section furnishes the sole and only test for determining whether the Act of 1872 was repealed by the act of 1887. There could be no repeal by implication in the face of that express provision in the Act of 1887. There could be no repeal under any general rule for the construction of statutes in the face of the specific

and particular rule established in said act itself. There could be no repeal contrary to that declared intention of the Legislature. [Ex parte Yerger, 8 Wall. 85, 105 (opinion by Mr. Chief Justice Chase); Patterson v. Tatum, 3 Sawy. 164, 169-170 (opinion by Mr. Justice Field); People v. Harris, 123 N. Y. 70 (opinion by Chief Justice Ruger); Robinson v. Rippey, 111 Ind. 112 (opinion by Judge Elliott); 1 Lewis's Sutherland, Stat. Cons. (2 Ed.), 272; 26 Ency. Law (2 Ed.), 733.]

The question, therefore, is, are the two acts in direct conflict so that both cannot stand, or is it possible for them both to stand, and the later be treated as supplemental to the earlier?

109 It is not necessary to say that this question should be decided without any regard whatever to our views of the merits of the policy inaugurated by the Act of 1872 (Robinson v. Rippey, 111 Ind. 112); and we should take up the consideration of the question with the remark of Mr. Chief Justice Chase in mind that "addition is not substitution" (Ex parte Yerger, 8 Wall. l. c. 105).

The Act of 1887 was passed at an extra session of the Legislature called by Governor Marmaduke by a proclamation which thus stated the matters for action at such session.

"To provide the legislative enactments necessary or expedient to enforce and execute those laws and principles, with reference to railways and railroad companies, which the people themselves have enacted and declared in their Constitution." [House Journal, Extra Sess., 1887, p. 3.]

When the Legislature met, May 11, 1887, the Governor communicated a special message, in which he elaborated the program indicated in his proclamation, but did not enlarge it. He spoke of the demands expressed by the people in the Constitution twelve years previously for legislation "affecting railroads as public highways, and railroad companies as common carriers;" he declared that those demands had been too long neglected, and, without making any specific mention of what said demands were, he referred the Legislature to his recent biennial message for a statement of them.

In that message under the heading "Railroads," the Governor had called the particular attention of the Legislature to certain provisions of the Constitution in the following words:

"I call your particular attention to the following sections of Article 12 of our Constitution: 'Section 7, prohibiting corporations from engaging in other business than that expressly authorized in 110 its charter,' also, section 8, fixing the conditions under which corporations may issue stock or bonds, and prohibiting all fictitious increase of stock; also, and very especially, section 14, which declares railways to be public highways, and the companies operating them common carriers; it also directs the General Assembly to pass laws to correct abuses and to prevent unjust discrimination and extortion, and to fix maximum rates and charges and 'enforce all such laws by adequate penalties;' also section 17, which prohibits the consolidation of parallel or competing lines under one management; also, section 22, which prohibits the president and other officers of any railroad company being interested, directly or indirectly, in

furnishing material or supplies to such company; also, section 24, which prohibits railroad and other transportation companies from granting free passes or tickets 'to members of the General Assembly or members of the Board of Equalization, or any state or county or municipal officer.'"

It was in compliance with said proclamation and messages that the Legislature passed the Act of 1887, entitled, "An Act to Regulate Railroad Corporations."

It is most significant that the Governor made no mention of section 12 of article 12 of the Constitution. He called attention to six other sections of said article, but said nothing about that section. He must have been familiar with that section, and he must have been familiar with the Act of 1872, whose provisions formed a part of the Revised Statutes of 1879 (sec. 820). Having in mind the failure of the Legislature to carry out the injunctions imposed upon it by the provisions of section 14 to enact certain legislation, he surely would have said something about the legislation enjoined upon the Legislature by section 12 for the enforcement of its provisions, if he had not thought that the Act of 1872 was a sufficient enforcement of them. Whatever may be the explanation, the signifi-
111 cant fact is that the Governor made no mention of the short-haul rule covered by section 12 and the Act of 1872.

Another important fact to be borne in mind is, that the Governor's entire effort was to secure omitted legislation, not to correct defective legislation already enacted. He sought new laws; not the repeal of existing laws.

No intimation is intended that, under said proclamation and messages, the Legislature in special session could not have repealed the Act of 1872 had it deemed it proper so to do, in enacting the legislation which it had been called upon to enact; but the facts mentioned furnish strong argument in favor of the proposition that the Legislature, by the Act of 1887, did not intend to repeal the Act of 1872, but did intend to make the former act supplemental to the latter.

The Act of 1887 was quite comprehensive. It contained 24 sections. And it covered all sorts of discrimination, including both discrimination against localities and against individuals.

It is manifest that said act, so far as it concerned discrimination against individuals, was not in conflict with the Act of 1872, which was wholly confined to local discriminations. As to all individual discriminations the Act of 1887 was supplemental to the Act of 1872. No argument seems necessary to establish this self-evident proposition.

All the local discriminations covered by the Act of 1887 are discriminations under "like circumstances" or "substantially similar circumstances and conditions." The Act of 1872, as construed by everybody, ignores circumstances and conditions, and prohibits the forbidden things, regardless of circumstances and conditions. The Act of 1887 has a short-haul section, but it is confined to hauls in the same direction under similar circumstances and conditions. [Laws 1887, sec. 4, p. 17; R. S. 1899, sec. 1134.] As here-
112 inbefore frequently and as just stated, the short-haul section of the Act of 1872 is not confined to any direction or cir-

cumstances and conditions, but includes all hauls in every direction and under all circumstances and conditions. That is to say, the Act of 1887 forbids a railroad company to receive "any greater compensation in the aggregate for the transportation of like kinds of property under similar circumstances and conditions for a shorter than a longer distance over the same line in the same direction" (Id.), while the Act of 1872 prohibits a railroad company to receive for the transportation of property any greater amount as compensation than is charged for the transportation of the same class of property over a greater distance upon the same road, without regard to direction or circumstances or conditions.

It is plain to me that there is no necessary conflict between the two acts in regard to the short-haul clause. Both acts can stand. It is, of course, plain that anything in this regard covered by the Act of 1887 is also covered by the Act of 1872, because a haul in the same direction and under similar circumstances and conditions, in the meaning of the former act, must be a haul in some direction and under some conditions, in the meaning of the latter act. But that does not create conflict. Two laws do not conflict with each other simply because they "establish the same right or provide redress for the same wrong," and in such a case, "the person seeking to enforce the right or avenge the wrong may proceed on the law he chooses." [Bishop's Written Laws, sec. 163d; Robinson v. Rippey, 111 Ind. 112.] In the case last cited Judge Elliott said, among other things: "The fact that both of the statutes are directed to the attainment of the same end does not warrant the conclusion that the later repeals the former. Statutes constructing two systems for the government of the same subject may both stand. [Beals v. Hale, 4 How. 113 37; Wood v. United States, 16 Pet. 342, 363; Daviess v. Fairbairn, 3 How. 636; Randelaugh v. Shelley, 6 Oh. St. 307.]"

The acts of 1872 and 1887 created two systems for preventing discrimination by railroad companies. The system created by the latter act contains some but not all of the things contained in the system created by the former act, and many other things. The systems are by no means identical, and they do not conflict with each other.

What if a violation of the short-haul section of the Act of 1887 also violates the Act of 1872? The person injured by said violation can proceed under the Act of 1872, and the fact that the matter or thing complained of also constitutes a violation of the Act of 1887 will not prevent his recovery. Take the case at bar. The allegations in every count of the petition show a violation of the Act of 1872 and not of the Act of 1887, for the reason that there is, except in one count, no allegation that the longer and shorter hauls were in the same direction, and in none of the counts is there any allegation that the hauls were under the same or like circumstances and conditions. Proof of said omitted fact would not have defeated plaintiff's recovery. Such proof would have been essential to a recovery under the Act of 1887, but such proof would not have prevented a recovery in the case at bar, founded on the Act of 1872.

This is precisely the view taken of a similar situation by Mr. Justice Story in Wood v. United States, 16 Pet. 342, 363. The question there was whether certain sections of an act of Congress of 1830 and 1832 were repugnant to a certain section of the act of 1799. He said in part: "In truth, however, there is not the slightest repugnancy between these sections of the acts of 1830 and 1832, and the sixty-sixth section of the Act of 1799. The former apply only only to cases where there has been an opening and examination of the packages imported, before they have passed
114 from the custody of the custom-house; and in the course of such examination, the fraudulent intent in the making up of the package or invoice has been detected; and thereupon it declares the same to be forfeited. Now, the sixty-sixth section of the Act of 1799 may cover the same cases, but the forfeiture is the same; and therefore the provisions in such a case may well be deemed merely cumulative, and auxiliary to each other. But the sixty-sixth section is not confined to such cases. On the contrary it covers all cases where the goods have entered, and have passed from the custom-house without any examination or detection of the false invoices. It is, therefore, much more broad in its reach. To enforce a forfeiture under the sections of the acts of 1830 and 1832, it would be necessary to allege, in the information or libel, all the special circumstances of the examination and detection of the fraud, under the authority of the collector; for they constitute a part of the res gestæ, to which the forfeiture is attached. But under the sixty-sixth section, no such allegations would be necessary or proper, as the forfeiture immediately attaches to every entry of goods falsely and fraudulently invoiced, without any reference whatever to the mode or the circumstances under or by which it is ascertained."

The fact that the penalties created by the two acts are different is immaterial. In order to enforce the penalties prescribed by the Act of 1887 for violating its short-haul section, it is necessary to allege and prove that the shorter and longer hauls were made in the same direction and under similar circumstances and conditions. Such allegations and proof would not be needed to enforce the penalty prescribed by the Act of 1872, and in a proceeding to enforce the latter penalty it would be no defense to show the facts
making the defendant liable to the other penalties. Just as
115 in a proceeding against one for a common assault, it is no defense to prove that the assault was felonious.

This principle has been recognized by the Supreme Court of the United States in Beals v. Hale, 4 How. 37, 53. In that case the court referred to a number of cases cited in Coke, and added: "Among them is one where an act of parliament made an offense punishable at the quarter sessions, and another passed making it punishable at the assizes, without any words of repeal. It was held that you may indict under either or at either court. [1 Coke 63.]"

For these reasons I think that McGrew v. Mo. Pac. Ry. Co., 17 Mo. 533, was correctly decided.

There was an inaccuracy in the opinion in that case which, in

my opinion, was not of controlling importance. Mention of it is now made because of the importance given to it during the discussion of the present case. It was stated that section 1126, Revised Statutes 1899, which was section 1 of the Act of 1872, was passed in obedience to the mandate of section 12 of article 12 of the Constitution. The statement was made as a "cogent reason" why the Act of 1872 was not repealed by the Act of 1887. The statement was, of course, erroneous, for the reason that the Act of 1872 antedated the Constitution, but to my mind the error is of no importance. The important fact is that the Act of 1872 was deemed, in a great measure, to be an enforcement of said section 12 of article 12 of the Constitution, and it was argued that for that reason its repeal was not probable.

VI. The petition was framed upon the Act of 1872, but in view of the fact that the trial court denied the penalties asked, and allowed only the difference between the higher rates charged plaintiff and the lower rates charged by defendant for the longer distances, the judgment could be sustained upon section 12 of article 12 of the Constitution, without the aid of the Act of 1872,
116 provided that said section of the Constitution is self-enforcing. Because if said section is self-enforcing, that is to say, if it, without the aid of any statutory enactment, makes it unlawful for a railroad company to charge more for a shorter haul than a longer one of the same class of property in any direction, the same or not, and under any or all circumstances and conditions, then clearly the measure of damages for doing the unlawful thing, in the absence of any statute upon the subject, is the amount of the excess charged for the shorter distance over that charged for the longer distance. [W. U. Tel. Co. v. Pub. Co., 44 Neb. 346.]

For this reason it seems important to determine whether said section of the Constitution is self-enforcing.

Much has been said by courts and text-writers upon the question as to what constitutional provisions are and what are not self-enforcing or self-executing. It is not thought necessary to go into this subject with the purpose of endeavoring to state a rule that will reconcile all the authorities or that will determine all cases that may hereafter arise.

It must be conceded by all that wherever the Constitution of a State establishes a rule creating a new right so that, had the right, as created by the Constitution, existed at common law, it could have been enforced by some common law action, then the constitutional provision is self-enforcing to the extent of authorizing its enforcement by an appropriate action at law. And it matters not that the Legislature might be able to supply other and better methods for protecting or enforcing said right, or even that the Legislature should be directed by the Constitution itself to pass suitable laws for enforcing the rule established by it. If the right be clearly created by the Constitution, it can be enforced in the
courts without legislative action. The courts will find a
117 remedy, and will not permit the Legislature to destroy the right by failure to act, any more than by affirmative action,

Constitutional rights are above legislative destruction or impairment, by action or non-action.

In Householder v. Kansas City, 83 Mo. 488, the question was as to the self-executing character of the following provision of our Constitution:

"Private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested." [Const., art. 2, sec. 21.]

The court was composed of Judges Hough, Henry Norton, Ray and Sherwood. In an opinion by Judge Henry, Concurred in by all, it was held that said provision is self-executing. It was said in the opinion that the clause relating to the ascertainment of compensation was intended to authorize the Legislature to prescribe an exclusive method of ascertaining the damages, under the limitations named, but that the failure of the Legislature to prescribe any method could not be permitted to deprive the owner of the property taken or damaged for public use of just compensation; that the first clause of said section gave him an unconditional right to such compensation; that the failure of the Legislature to prescribe a statutory method for the ascertainment of said compensation affected the remedy only and not the right; and that the owner of said property could maintain an action at common law for the value of his property taken. This in accordance with the settled rule of law that there is and can be no such thing as a legal right without a remedy for its enforcement, which Judge Henry stated in these words: "Wherever a statute or the organic
118 law creates a right, but is silent as to the remedy, the party entitled to the right 'may resort to any common law action which will afford him adequate and appropriate means of redress.'" That case has been followed and approved in the following cases among others: Shelby v. Railroad, 91 Mo. 574; Keith v. Bingham, 100 Mo. 300; Hickman v. Kansas City, 120 Mo. 117; Sharp v. National Biscuit Co., 179 Mo. 553; Cummings v. Winn, 89 Mo. 51. The Householder case states the recognized doctrine in this state and the doctrine sustained by reason and the overwhelming weight of authority.

In the previous case of St. Joseph School Board v. Patten, 62 Mo. 444, it was held in an opinion by Judge Napton, concurred in by Judges Sherwood and Hough, that our constitutional provision limiting the rate of taxation for school purposes, with the proviso that the rate might be increased in certain classes of school districts on the condition that a majority of the taxpayers voting at an election to be called to decide the question, vote for said increase, was self-executing, and that the failure of the Legislature to provide for an election on this question of such increase did not affect the self-executing character of said provision.

But in another prior case this court had rendered a decision out of

line with the doctrine announced in the Householder case. In Fusz v. Spaunhorst, 67 Mo. 256, the question was whether the following provision of our Constitution was self-executing so as to make the officers of the bank liable under its provisions:

"It shall be a crime, the nature and punishment of which shall be prescribed by law, for any president, director, manager, cashier or other officer of any banking institution, to assent to the reception of deposits, or the creation of debts by such banking institution, after he shall have had knowledge of the fact that it is insolvent, or in failing circumstances; and any such officer, agent or manager shall be individually responsible for such deposits so received, and all such debts so created with his assent." [Art. 12, sec. 27.]

This court held in an opinion by Judge Sherwood, concurred in by Judges Napton, Hough, Norton and Henry, that the provision making the officers of the failing bank liable is not self-executing. The opinion was based largely upon the first part of the section, "It shall be a crime, the nature and punishment of which shall be prescribed by law," etc., which, of course, was not self-executing, and it was argued that neither was it intended to make the civil part of the section self-executing. Groves v. Slaughter, 15 Pet. 449, was cited among other cases in support of the court's opinion. The Fusz case is no longer recognized as the law in this State, any more than in Groves v. Slaughter recognized as having been correctly decided.

In Cummings v. Winn, 89 Mo. 51, 56, Judge Henry said that he had concurred in the opinion in Fusz v. Spaunhorst, but had become satisfied that said opinion was erroneous, citing the Householder case in support of his present conviction. Speaking of the section of the Constitution involved in the Spaunhorst case, he said that the first clause declaring "it shall be a crime, the nature and punishment of which shall be prescribed by law," etc., is clearly not self-executing, but that the last clause is. He added: "It declares the individual responsibility of the guilty officer—confers a right upon the depositor, or creditor, to recover from such officer his debt or deposit. When the law gives a right but prescribes no remedy, any common law action may be resorted to, adapted to the case, and under our code there can be no difficulty as to the remedy. We have in this State 'but one form of action for the enforcement or protection of private rights, and redress or prevention of private wrongs, which shall be denominated a civil action.' [Sec. 3641, R. S. 1879.]"

In Sharp v. National Biscuit Company, 179 Mo. 553, it was held that the amendment to our Constitution authorizing three-fourths of a jury in civil cases in courts of record to render a verdict is self-executing. In the opinion in that case Fusz v. Spaunhorst was treated as having been overruled in Cummings v. Winn, 89 Mo. 51.

In State ex rel. v. Lesueur, 145 Mo. 322, it was held by a unanimous opinion by Court in Banc that the constitutional provision that "no corporation * * * shall be created or organized, * * * unless the persons named as corporators shall * * * pay into

the State Treasury fifty dollars for the first fifty thousand dollars or less of capital stock" is self-executing.

Section 6 of article 12 of the Constitution, in relation to cumulative voting in corporations, has been assumed to be self-executing. Judge Gantt said in Gregg v. Granby Co., 164 Mo. l. c. 626, that said section granted the right to each shareholder to vote on the cumulative plan.

In State v. Warner, 165 Mo. 369, it was held that the provision of the Bill of Rights in our Constitution that "in criminal prosecutions the accused shall have the right to appear and defend in person and by counsel," is self-executing. In the opinion it was said, in part, that "whenever a constitutional right, such as is now under discussion, has no statute specially adapted to enforce it, by its own inherent potency, and leaning not on the adventitious aids of statutory regulation, it supplies the lack of statutory provisions and enforces itself." [165 Mo. 414-415.]

In State v. Kyle, 166 Mo. 287 (in Banc), in an opinion by Judge Burgess, concurred in by all the other judges, it was held that the amendment to our Constitution, making indictment and information concurrent remedies in prosecutions for felonies, is self-executing. Judge Burgess said that there are a number of provisions in our Constitution that are self-executing, and that require no legislation to put them in operation, and that the test in all cases involving
121 this question is, can the provision in question be enforced without legislation?

In Evans v. McFarland, 186 Mo. 703, 727 (in Banc), it was held that the provision of our Constitution that fixed a maximum of indebtedness which any municipal or political corporation or subdivision of the State can incur, provided that such corporation or subdivision can assent to an increase on indebtedness beyond said maximum amount, but provided further that any such corporation or subdivision shall, before or at the time of giving such assent, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment thereof, etc., is self-executing. To a like effect is East St. Louis v. Amy, 120 U. S. 600.

The courts elsewhere in this country quite generally announce the same doctrine.

The Constitution of Maryland contained the following provision:

"The rate of interest in this State shall not exceed six per cent per annum, and no higher rate shall be taken or demanded, and the Legislature shall provide, by law, all necessary forfeitures and penalties against usury."

Mr. Chief Justice Taney held on the circuit that said provision was self-executing, and that a note bearing usurious interest was void in toto. [Dill v. Ellicott, — Taney (U. S.) 233, 7 Fed. Cas. No. 3, 811.] Subsequently the Court of Appeals of Maryland decided that said provision was self-executing, but that it avoided only so much of the contract as provided for excessive interest. [Randel v. Isaac, 13 Md. 202.] Chief Justice Le Grand said in small part: "The

thing forbidden by the Constitution is the taking or demanding a higher rate of interest than six per cent: it is not forbidden to take or demand that or a lesser rate. The thing forbidden is the excess and nothing else, and that is what is illegal and void, and it is
122 within the province of the Legislature to punish this illegality by forfeitures and penalties. Whilst the Constitution makes it competent to the Legislature 'by law,' to forfeit the whole, or any part, of the money loaned, and in addition to impose a penalty, yet, until it does exercise this office, all that is 'avoided' by the Constitution is the excess beyond the six per cent." [p. 221.]

A like provision of the Constitution of Texas has been held to be self-executing, and the view of Chief Justice Taney is there taken. [Watson v. Aiken, 55 Tex. 536; Hemphill v. Watson, 60 Tex. 679; Quinlan's Estate v. Smyer, 21 Tex. Civ. App. 176.]

In Hemphill v. Watson, supra, Chief Justice Willie said in part: "This provision is prohibitory in its nature and self-executing so far as to render all contracts of the kind denounced immediately illegal: and it left to the Legislature the only remaining duty of saying what penalties should be imposed upon offenders against this clause of the Constitution."

A provision of the Constitution of Illinois that the recorder's court of the city of Chicago should be continued and called the "Criminal Court of Cook County," and should have jurisdiction in all criminal cases and quasi-criminal matters arising in the county of Cook, or which might be brought before it pursuant to law, was held to be self-enforcing. [People v. Bradley, 60 Ill. 390.]

So too was the provision of said Constitution that private property should not be taken or damaged for public use without just compensation, and that such compensation, when not made by the State, should be ascertained by a jury, and should be prescribed by law. [People ex rel. v. McRoberts, 62 Ill. 38.] In the course of the opinion in the case last cited, the court quoted the words of the Constitution "as shall be prescribed by law," discussed the words somewhat, and said: "The inhibition of any other mode of determining
123 the compensation is independent of and complete without the words quoted. They merely declare the duty of the Legislature." The court also said, speaking of other provisions of the Constitution: "Section 12 prohibits imprisonment of a debtor, unless upon refusal to deliver up his estate, 'as shall be prescribed by law.' Does the freedom of a citizen from incarceration, therefore, depend upon the action of the Legislature? We apprehend not. He is secure from imprisonment for debt except upon a refusal to surrender his estate for the benefit of his creditors, or there is strong presumption of fraud; and until the manner of surrender is provided by law. Section 16 forbids the quartering of troops in the house of the citizen, even in time of war, 'except in the manner prescribed by law.' The failure to prescribe the manner cannot destroy the prohibition." In speaking of the same section of the Constitution of that State the Supreme Court of Illinois in a subsequent case, said: "It is a constitutional right of which the party can not be debarred, either by the

action or non-action of the Legislature." The following provision of the Constitution of Illinois has been held to be self-enforcing:

"No county, city, township, school district or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness." [Lee v. People ex rel., 87 Ill. 386.]

In part it was said in the opinion by Mr. Justice Walker: "It has also been repeatedly held, and is regarded as settled doctrine, that all negative or prohibitory clauses of this character found in a constitution execute themselves, as legislative provisions, in the same or other language, prohibiting the incurring of such indebted-
124 ness, could be no more binding or forcible than the Constitution itself."

A provision of the Constitution of Tennessee that "the Legislature shall have no power to authorize lotteries for any purpose, and shall pass laws to prohibit the sale of lottery tickets in this State," was held to be itself a prohibition of lotteries. [Rice v. Nashville, Meigs 421.]

In Mallon v. Hyde, 76 Fed. 388, it was held that the provision of the Constitution of Washington, making individually liable an officer of a bank receiving deposits after he has knowledge of the bank's insolvency, is self-executing. And to the same effect is Rice v. Hoard, 69 Pacific 77 (Cal.), in relation to a like provision of the Constitution of California.

The double liability of stockholders of corporations established by constitutional provisions is also held enforcible without legislative enactment in aid of such provisions.

In State v. Woodward, 89 Ind. 110, the court held that the following provision of the Constitution of that State was self-enforcing: "No lottery shall be authorized, nor shall the sale of lottery tickets be allowed." In part the court said: "We are of opinion that the provision is not a mere check upon future legislation, but an absolute prohibition of lotteries and the sale of lottery tickets. It is so far self-executing as to take away any right or authority that might theretofore have existed to conduct lotteries or sell lottery tickets. Its evident meaning is that from the time of the adoption of the Constitution there should be no authority for conducting lotteries, nor should lottery tickets be sold. It needed legislation, to be sure, to make the conducting of lotteries or the selling of lottery tickets a crime with a prescribed punishment, but the provision effectually took away any authority that might have previously existed to do
those things. See Cooley's Const. Lim., [4th Ed.] pp. 99 to
125 102, and notes; also the opinion by Mr. Chief Justice Sharkey, in the case of Brien v. Williamson, 7 How. (Miss.) 14."

The great case on this subject is Brien v. Williamson, 7 How. (Miss.) 14. The Constitution of Mississippi provided: "The introduction of slaves into this State as merchandise or for sale, shall be prohibited from and after the first day of May, eighteen hundred

and thirty-three: Provided, that the actual settler or settlers shall not be prohibited from purchasing slaves in any State of this Union, and bringing them into this State for their own individual use, until the year eighteen hundred and forty-five." The Supreme Court of that State held said provision of the Constitution to be self-executing, and to be a prohibition of the traffic described, and that a note given in part payment for a negro imported by the payee in violation of said provision was void. The court that decided that case consisted of William L. Sharkey, Chief Justice, and Edward Turner and Alex M. Clayton, Associate Justices. Mr. Chief Justice Sharkey wrote the opinion, in the course of which he said in part: "We hold the contract void on either of two grounds. First, that the provision in the Constitution of 1832 does per se prohibit the introduction of slaves into this state as merchandise or for sale. * * * In support of our first position it is proper that we should inquire in the outset what a Constitution is, and how it operates. It is a form of government established by the people, designated for their general welfare as a society and as individuals. In the language of a learned jurist, 'it was made by the people, made for the people, and is responsible to the people.' It is but the frame and skeleton of a government, containing the general outline, leaving the detail to be filled up in subordination and auxiliary to the essential and fundamental principles thereby established. But it is not on that account the less binding. It is from its very nature and object the supreme law of the land, fixed and unalterable, except by the power that made it. It contains only certain great principles which are to control in all legislation, and extend through the whole body politic. These principles are of the nature of law. Constitutions do not usually profess to insure obedience by prescribing penalties, they merely declare the rule or establish the principle, which being paramount, makes void whatever is repugnant to it. Its mandates or principles bind by a moral power. * * * General principles, thought to be essential to a free government, are declared; and emanating from the sovereign authority, that mere declaration imparts to them all the force of a supreme law. * * * We may safely assert without the shadow of a doubt, that the convention did intend that the importation of slaves into this State as merchandise, should be prohibited after the 1st of May, 1833, either by force of the constitutional provision, or by legislative enactment, and having so intended and declared it through the Constitution, it became as much a fundamental and fixed principle in the government, as any other principle or provision whatever. It became by that mere declaration, pregnis vigore a law, and whether it may be supposed to be defective in not providing all the means necessary to enforce the prohibition makes no difference, provided it can by any means be carried into effect. Even if it was intended only as a mandate to the Legislature, its operation was to be on the citizens generally. It was not designed as one of those provisions which expend their whole force in directing and regulating the action of the legislative body, but its design was evidently to protect the people against a supposed evil. A time was

fixed at which the evil should be prohibited; and from that time it was a law in full force. The Legislature could not defeat it by removing the prohibition, and this shows that it had an existing operative force. Having that existing operative force, it was not liable to be defeated by omission. It was one of those principles
127 which required no legislative aid to give it strength, although some may think that its strength was susceptible of a more efficient application by legislative aid. All fundamental principles, whether inherent or otherwise, in any form of government, constitute a part of the law of that government. When the people prescribe their constitutional form of government, they ordain that every part of that form must have its appropriate effect; every principle is to be regarded as fundamental and self-executing." In his great opinion (p. 21) Mr. Chief Justice Sharkey also said: "The words 'shall be,' when used by a lawmaking power, are words of enactment; they declare the law."

The Mississippi Court had taken the same view of the law in previous cases, but the Supreme Court of the United States had declined to follow the State court in the construction of the State Constitution. (Groves v. Slaughter, 15 Pet. 449.) Mr. Chief Justice Sharkey's opinion was written, in effect, in answer to the Supreme Court of the United States. Groves v. Slaughter was decided by a divided court, and the several opinions written therein show clearly that the judgment of the court was the result of the exigencies of the slavery question and to avoid the decision of grave Federal questions.

Mr. Chief Justice Sharkey's opinion was followed subsequently in cases affected by said provision of the Constitution of Mississippi in Tennessee (Yerger v. Rains, 4 Humph. 270), and in Arkansas (Moore v. Clopton, 22 Ark. 125, 128), and its correctness, now after the slavery question has passed away forever, is, I believe, tacitly accepted by even the courts of the United States.

In Illinois Cent. Railroad v. Bielenberg, 75 Fed. 873, in an opinion by Judge Taft, it was held that a clause of the Constitution of Mississippi which provided that any knowledge by an injured employee
of the defective or unsafe condition of machinery should be
128 no defense to an action for injury caused thereby, was self-executing.

And in Davis v. Burke, 179 U. S. 399, which was an appeal from an order denying a writ of habeas corpus to appellant who had been found guilty of murder in the first degree, appellant objected to conviction on the ground, among others, that he had been illegally prosecuted by information, (1) because the constitutional provision of Idaho which in terms permitted prosecution by information was not self-enforcing, and (2) that the statute of that State, known as the Information Act, was void, because not passed in the manner required by said Constitution. The court held that said constitutional provision was self-enforcing. Mr. Justice Brown wrote the opinion of the court. He said in part: "Where a constitutional provision is complete in itself it needs no further legislation to put it in force. * * * In other words, it is self-executing only so far as

it is susceptible of execution. But where a Constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions. In short, if complete in itself, it executes itself. When a constitution declares that felonies may be prosecuted by information after a commitment by a magistrate, we understand exactly what is meant, since informations for the prosecution of minor offenses are said by Blackstone to be as old as the common law itself, and a proceeding before magistrates for the apprehension and commitment of persons charged with crime has been the usual method of procedure since the adoption of the Constitution. It is true the Legislature may see fit to prescribe in detail the method of procedure, and the law enacted by it may turn out to be defective by reason of irregularity in its passage. In such case a proceeding by information might be impeached in the State court for such irregularity, but it certainly would not be void as long as it was authorized by the Constitution. For us to say that the accused had been denied due process of law would involve the absurdity of holding that what the people had declared to be the law was not the law."

In Central Iron Works v. Pennsylvania Railroad, 5 Pa. Dist. 247, in an opinion by Simonton, P. J., it was held that a provision of the Constitution of Pennsylvania was self-enforcing, that declared that "persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class, in the same direction, to any more distant station." Judge Simonton said among other things: "There are undoubtedly many provisions in the Constitution which presuppose and require legislation to carry them into effect, but there are also many, efficient in themselves, which need no aid from legislation. Of these, art. 16, sec. 4, providing for cumulative voting for directors of corporations, is one. [Pierce v. Com., 104 Pa. St. 150.] Delivering the opinion of the court in this case, Gordon, J., said, at p. 155: 'But it is said this provision is but directory, and it cannot go into effect without legislative action directing the manner of its exercise. To this proposition we cannot assent. * * * The constitutional right is one that belongs solely and exclusively to the individual shareholder. * * * legislative action is, therefore, uncalled for. * * * With the right itself, the General Assembly cannot meddle.' So, here, the right conserved by the Constitution belongs to each individual shipper, and the ordinary process of the courts is ample for its enforcement. There is, therefore no necessity for legislative action." In further part Judge Simonton said: "Nothing could be added to this [constitutional provision] by an act of the Legislature which would render it more clear or definite, and, as was said in Pierce v. Com., supra, it would not be in the power of the Legislature to take anything from it." Judge Simonton further referred to the fact that the provision of the Constitution of Pennsylvania which prohibits the damaging of private property without just compensation had been held to be self-enforcing.

[Reading v. Althouse, 93 Pa. St. 400; Fredericks v. Canal Co., 148 Pa. St. 317.] And that no one had contended that the provision of said Constitution providing that no existing railroad, canal or other transportation company, should have the benefit of a certain article thereof; except on condition of the complete acceptance of all the provisions of said article, needed legislation to enforce it; and that no claim had ever been made that legislation was necessary to enforce that provision of said Constitution that prohibits the consolidation of competing or paralled lines of transportation.

Section 12 of article 12 of our Constitution clearly establishes an unconditional short-haul rule, without regard to direction or to circumstances and conditions. Said section declares that it shall be unlawful for any railroad company to charge for the transportation of freight or passengers a greater amount for a less distance than "the amount charged for any greater distance." That declaration establishes a rule, and creates a right in every passenger and shipper to a compliance with, and an obedience to its terms. The direction to the Legislature that it pass suitable laws to enforce the rule established, contained in said section, did not suspend the rule or right of passengers and shippers to a compliance with its terms, until the Legislature should comply with said direction and pass such laws. Said section has the same force and effect as if it read: "It shall not be lawful in this State for any railroad company to charge, under penalties which the General Assembly shall prescribe, for freight or passengers a greater amount for the transportation
131 of the same, for a less distance than the amount charged for any greater distance." Had said section read that way, its effect as an operative law would have been too clear for controversy. To my mind it is equally clear under the present reading. Something was said in argument about said section being too vague and uncertain to be self-executing. But this argument is untenable. Said section is not identical with the Act of 1872. The former includes both freight and passengers, while the latter applies only to freight; the former applies only to hauls for a greater distance, while the latter includes hauls both for a greater and the same distance; and the former applies only to the short-haul rule, while the latter includes both that rule and a provision requiring equality of rates for "receiving, handling or delivering freight at different points" on the same road. All these differences are immaterial so far as concerns the point under discussion. The words of the section of the Constitution and of the Act of 1872 in defining the greater haul are identical. Nothing is said in either indicating direction or condition and circumstances. The act has been uniformly construed, in this State and in Illinois, to mean any direction, and any and all circumstances and conditions, and therefore, if the Act of 1872 is sufficiently explicit, so too is the section of the Constitution.

In my opinion plaintiff's judgment can be sustained upon said provision of our Constitution, without the aid of the Act of 1872.

The judgment is affirmed. Gantt, Valliant and Lamm, JJ., concur; Fox, C. J., Burgess and Woodson, JJ., dissent.

Dissenting Opinion.

WOODSON, *J.*,

The respondent instituted this suit in the circuit court of Lafayette county to recover $7,462.13, overcharges and penalties al-
132 leged to be due him from appellant for its violation of certain sections of the Revised Statutes of 1899, regarding freight charges, for transportation of coal from Myrick, Missouri, to various other towns in this State.

There was a trial before the court, without the intervention of a jury, which resulted in a judgment for the respondent for the amount sued for, and the appellant duly prosecuted its appeal to this court.

The facts are undisputed, and are substantially as follows:

The respondent is a coal miner and shipper at Myrick, Missouri; and appellant is a railroad corporation duly organized and incorporated under the laws of this State; Myrick and the other towns mentioned are located along the line of said railroad; respondent made divers shipments of coal over said road to the said various towns. The suit is to recover overcharges and penalties for the alleged violation of sections 1126 and 1160, Revised Statutes 1899, prohibiting railroads from exacting a higher toll for carrying freight from one point to another in the State than they charge for the same class and quantity of freight carried a greater distance. The appellant collected of respondent certain sums in excess per ton for said shipments than it did for the same class and quantity of coal shipped for longer distances, aggregating the sum sued for.

At the close of the testimony counsel for the plaintiff prayed the court to grant this instruction on the part of the plaintiff: "The court declares the law to be that upon the pleadings and the evidence herein the finding and judgment must be for the plaintiff," which was by the court given. To the giving of which instruction on the part of the plaintiff, the defendant by its counsel then and there duly excepted.

The respondent bases his cause of action upon sections 1126 and 1160, Revised Statutes 1899, which are as follows:

133 "Sec. 1126. No railroad corporation organized or doing business in this State, under any act of incorporation or general law of this State now in force, or which may be hereafter enacted, shall directly or indirectly charge or collect for the transportation of goods, merchandise, or property on its said road for any distance, any larger or greater amount as toll or compensation, than is charged or collected for the transportation of similar quantities of the same class of goods, merchandise or property over a greater distance upon the same road, nor shall such corporation charge different rates for receiving, handling or delivering freight at different points on its road or roads connected therewith, which it has a right to use, nor shall any such railroad corporation charge or collect, for the transportation of goods, merchandise or property over any portion of its road, a greater amount as toll or compensation than shall

be charged or collected by it for the transportation of similar quantities of the same class of goods, merchandise or property over any other portion of its road of equal distance; and all such rules, regulations or by-laws of any railroad corporation, as fix, prescribe, or establish any greater toll or compensation than is hereinbefore prescribed, are hereby declared to be void.

"Section 1160. Any railroad corporation which shall fix, demand, take or receive, from any person or persons, any greater toll or compensation for the transportation, receipt, handling or delivery of goods or merchandise, in violation of the provisions of this article shall forfeit and pay for any such offense any sum not exceeding one thousand dollars, and costs of suit, including a reasonable attorney's fee, to be taxed by any court where the same is heard by appeal or otherwise, to be recovered by civil action by the party aggrieved, in any court having jurisdiction thereof; and any officer, agent or employee of any such railroad corporation who shall knowingly
134 or wilfully violate the provisions of this article shall be liable to the penalties prescribed in this section."

It will throw some light upon the legal propositions involved in this suit if we will bear in mind the history of this legislation. The two sections above quoted were originally enacted in 1872, and were sections 1 and 4 of that act [Laws of 1874, pp. 67 and 70]. Without alteration they were brought forward and incorporated in the Revised Statutes of 1879, and are therein numbered sections 820 and 822, respectively. They were again brought forward without any change into the Revised Statutes of 1889, and are sections 2629 and 2663, and were in like manner brought forward into the Revised Statutes of 1899, and are now sections 1126 and 1160. Briefly stated, sections 1 and 4 of the Act of 1872 have been brought forward through all the revisions of the statutes without change down to and including the revision of 1899, and are numbered therein sections 1126 and 1160.

The appellant assails the constitutionality of those statutes for the reason that they were not enacted in accordance with the requirements of section 32, article 4, of the Constitution of 1865. That section reads as follows: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed."

The title to the Act of 1872 is as follows: "An Act to prevent unjust discrimination and extortion in the rates to be charged by the different railroads in this State, for the transportation of freight on said roads."

The appellant contends that the title of the act is directed against unjust discriminations, while the act itself prohibits all discriminations whether just or unjust. The appellant insists that if the validity of that act is tested by the constitutional provision before
quoted, then that portion of the act which prohibits all dis-
135 crimination is void and inoperative, for the reason it is not mentioned in the title of the act.

The title of the Act of 1872 does not purport to prohibit all discrimination in the transportation of freight, but in express terms directs its inhibition against unjust discrimination only. The principle of expressio unius est exclusio alterius applies here, and there is no possible escape from the conclusion that all discrimination is not embraced in the title of the Act of 1872. Having shown that the title of the act in question does not prohibit all discrimination by railroads in the shipment of freight, it would seem to be useless to cite authorities to sustain the proposition that such portion of the act which attempts to do so, is in the language of the Constitution, 'void' and inoperative; but since the majority of the court entertain different views regarding the legal questions involved in this case, I feel called upon to fortify each and every proposition that I shall present herein with an abundance of authority.

In consideration of that provision of the Constitution, this court in the case of St. Louis v. Weitzel, 130 Mo. l. c. 646, used the following language: "The evident object of the provision of the organic law relative to the title of an act was to have the title, like a guide board, indicate the general contents of the bill, and contain but one general subject which might be expressed in a few or a greater number of words. If those words only constitute one general subject, if they do not mislead as to what the bill contains; if they are not designed as a cover to vicious and incongruous legislation, then the title can stand on its own merits, is an honest title and does not impinge on constitutional prohibitions."

That great constitutional lawyer, Chief Justice Cooley, in treating this same question, in his valuable work on Constitutional Limitations, at page 205 (7 Ed.), used this language: "It may there-
136 fore be assumed as settled that the purpose of these provisions was: * * * Second, to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire." And continuing, on page 212, he says: "The courts cannot enlarge the scope of the title; they are vested with no dispensing power; the Constitution has made the title the conclusive index to the legislative intent as to what shall have operation; it is no answer to say that the title might have been made more comprehensive, if in fact the Legislature has not seen fit to make it so. Thus, 'An act concerning promissory notes and bills of exchange,' provided that all promissory notes, bills of exchange, or other instruments in writing, for the payment of money, or for the delivery of specific articles, or to convey property, or to perform any other stipulation therein mentioned, should be negotiable, and assignees of the same might sue thereon in their own names. It was held that this act was void as to all the instruments mentioned therein except promissory notes and bills of exchange; through it is obvious that it would have been easy to frame a title to the act which would

have embraced them all, and which would have been unobjectionable."

This same question came before this court again in the case of State v. Persinger, 76 Mo. 346, and on page 347, this language is used: "We are of the opinion that the motion to quash was properly sustained for the reason that the said act was entitled, 'An act to change the penalty for disturbances of the peace.' This title only authorized the passage of an act changing the penalty for such
137 disturbances of the peace as were then by law declared punishable. The said Act of 1870, while it changed the punishment for such offenses, went further and undertook to amend the Act of 1868 by so changing it as to make it an offense for one person to disturb the peace of another person. While the title of the act embraced but one subject, namely a change of the penalty for disturbing the peace, the body of the act not only included that subject, but also another, viz., amending the law so as to make that a disturbance of the peace under the Act of 1870, which was not an offense under the Act of 1868. It therefore follows that as the Act of 1870 embraced two subjects, one of which was not expressed in its title, it is violative of the 32d section, article 4, of the Constitution of 1865, and void as to so much thereof as is not expressed in the title."

The Act of 1872, now under consideration, is a verbatim copy of an act passed by the Legislature of Illinois in 1871. At the time of its enactment that state had a similar constitutional provision to ours, and is as follows: "The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of their property and franchises." [Sec. 15, art. II, Constitution of Illinois.] In obedience to that constitutional command, the Legislature of that state passed the act of which the one in question is an exact copy, and the title of that was as follows: "To prevent unjust discriminations and extortions in the rates to be charged by the different railroads in this State, for the transportation of freight on said roads." The question we now have before us came before the Supreme Court of Illinois in the case
of the Chicago & Alton Railroad Co. v. People ex rel., 67 Ill.
138 11, and in passing upon the constitutionality of that act, that court used this language: "This provision expressly directing the Legislature to pass laws to prevent unjust discrimination is a recognition of the palpable fact that there may be discriminations which are not unjust, and by implication it restrains the power of the Legislature to a prohibition of those which are unjust. That was undoubtedly the object of the Legislature in passing the existing law. This is clearly shown by its title. But the act itself goes further. It forbids any discrimination whatever, under any circumstances, and whether just or unjust, in the charges for transporting the same classes of freight over equal distances, even though moving in opposite directions, and does not permit the companies to show that the discrimination is not unjust. * * * Before this act can be enforced it should be so amended as to correspond with the require-

ments of the Constitution by directing its prohibitions against unjust discriminations."

When we consider that the Supreme Court of Illinois has held the act of which ours is a copy to be unconstitutional, and the fact that said opinion is in harmony with the many decisions of this court, involving similar statutes and constitutional provisions, and fortified and reinforced as they are by Chief Justice Cooley's great work, it seems to me that there is no logical escape from the conclusion that the Act of 1872, in so far as it prohibited all discriminations made by a railroad in the transportation of freight, was unconstitutional and void. These views are supported by the following cases from this court: State ex rel. v. Lafayette County, 41 Mo. 39; State v. Great Western Coffee Co., 171 Mo. 634; Kansas City v. Payne, 71 Mo. 159; State ex rel. v. Baker, 129 Mo. 482; Witzmann v. Railroad, 131 Mo. 612; Shively v. Lankford, 174 Mo. 535; Dart v. Bagley, 110 Mo. 42; In re Hauck, 70 Mich. 396; Callaghan v. Judge of Superior Court, 79 Mich. 610; 26 Am. and Eng. Ency. Law (2 Ed.), pp. 579, 590.

139 II. In the previous paragraph of this opinion we have assumed that the learned counsel for respondent was correct in his contention that the Act of 1872, from which sections 1126 and 1160 of the Revised Statutes of 1899 are literally copied, was enacted for the purpose of preventing railroad companies from making discriminations in the shipment of freight over their roads. My associate, in his opinion, has adopted that same view of that act; but with all due respect for his ability, learning and judicial experience, I feel constrained to entirely disagree from the conclusions herein reached; and, if I am right in my construction of that act, it is not only unconstitutional upon the grounds stated in paragraph one hereof, but for two other equally valid reasons, which I will now proceed to state.

It should be borne in mind that the Constitution of 1865 was perfectly silent upon the questions involved in this litigation, nor was there any legislation upon those matters until the Act of 1872 was passed. All freight and passenger traffic over railroads prior to that time was governed by the common law, which allowed common carriers to make reasonable and just discriminations in the transportation of freight and passengers. [4 Elliott on Railroads, secs. 1467, 1565 and 1676; 17 Am. and Eng. Ency. Law (2 Ed.), p. 135; 2 Hutchinson on Carriers (3 Ed.), secs. 521, 588 and 589; Railroad Commission v. Weld, 96 Tex. 394.]

Now the body of the Act of 1872 did not say a word about just or unjust discrimination in the transportation of freight; nor is there any language contained in the act which prohibits either just or unjust discrimination, but left the shipper and carrier in that regard just where the common law placed them, with the exception as to short or long hauls. Section 1 of the Act of 1872 only prohibited railroad companies from charging more for a short haul than for a long one, along all portions of their lines, and has no reference directly or remotely to the question of discrimination.

140 Section 2 defined the meaning of the words "railroad corporations," as used in the act. Section 3 was to prevent the increase of

tariff rates above what they were the year previous. Section 4 prescribes the penalty for the violation of the provisions of the act; and section 5 is an emergency clause.

The first constitutional provision adopted by this State upon the question is section 12 of article 12 of the Constitution of 1875, which reads as follows: "Sec. 12. It shall not be lawful in this State for any railway company to charge for freight or passengers a greater amount, for the transportation of the same, for a less distance than the amount charged for any greater distance; and suitable laws shall be passed by the General Assembly to enforce this provision; but excursion and commutation tickets may be issued at special rates."

Clearly, this provision is fashioned after the Act of 1872, and was laying one of the two corner stones upon which the Legislature was commanded to base a system of laws, which would "correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State." But taken by itself, this section of the Constitution is not so comprehensive in its provisions, commands and injunctives as were those of the Act of 1872. Neither that section nor that act prohibits discriminations in the transportation of freight and passengers, but were for the purpose of preventing railroads from charging more for a short haul than they charged for a long haul, which applied to everyone without discrimination, and if it was not for section 14 of the same article, I suppose it would not be seriously contended that a railroad company would not have a perfect legal right, barring the common law rule, to discriminate in favor of one person against another, in furnishing cars and in receiving and delivering freight; nor from charging one person the same price for carrying freight five hundred miles that it charged another for carrying the same amount and quality a distance of fifty miles, or from charging one person the same price for a short and a long haul and charging another a higher or lower price for carrying the same quantity and quality of freight the same distance. If there are any such inhibitions couched in either the Act of 1872 or in said section 12 of the Constitution I have been unable to find them. But in order to prevent just such discriminations as above pointed out, section 14 of the same article of the Constitution was adopted, which is as follows:

"Sec. 14. Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways and railroad companies common carriers. The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties."

When we consider sections 12 and 14 together, which we must do in order to get at the intention of the framers of the Constitution, it is clearly seen that it was their intention to have the Legislature

pass such laws as would not only prevent railroad companies from discriminating in furnishing cars, receiving and delivering freight, but also to prevent all unjust and unreasonable discriminations among shippers in the short and long hauls; but neither of said sections, nor both construed together, were intended to prevent just and reasonable discriminations within the limitations of those sec-
112 tions and laws thereafter to be enacted in pursuance thereof. If it had been the intention of the framers of the Constitution to prevent all discrimination, reasonable and just, as well as unreasonable and unjust, then why did they provide in both of said sections that the Legislature should enact suitable laws to carry into effect these provisions? If the intentions had been to prohibit all discrimination, then why did they not so state in so many words in the Constitution, and at the same time declare such provisions to be self-enforcing? By so doing all the legislation we have upon these subjects and the complications and litigation that have grown out of the same could and would have been avoided. But the fact that the Constitution did not so provide, taken in connection with its command to the Legislature to enact suitable laws to carry into effect these provisions and to prevent unreasonable charges and unjust discrimination and extortion, indicate to my mind that it was never the intention to prevent just and reasonable charges and discriminations within the constitutional and statutory limitations then fixed, or thereafter to be established. And it should also be borne in mind that the constitutional provisions under consideration were adopted, not because the Legislature did not previously possess ample power to enact such laws as would prevent the abuses therein denounced, but were intended as a command to the Legislature to enact such laws as would prevent the abuses therein mentioned and at the same time place limitations upon the power of the Legislature in fixing rates to be charged and prohibiting it from fixing a rate which would be below what was reasonable and just, and thereby withdraw from the Legislature the power to fix rates which would be confiscatory under the provisions of the State and Federal Constitutions. [McCully v. Railroad, 212 Mo. 1; Railroad v. Smith, 173 U. S. l. c. 687 and 688.]

The Constitution by commanding the Legislature to pass
113 suitable laws to correct the abuses and extortions therein mentioned, and which had been practiced by many of the roads in fixing and collecting rates, no more intended thereby to abolish all discriminations than it did to prohibit the collection of all rates and tolls, because the very same language of the section which is directed at the one is directed at the other, and both are found in the same clause and sentence of said section 14; and what applies to one must of necessity apply to the other. Had the framers of the Constitution intended to prohibit the collections of all tolls for carrying freight and passengers, then that provision of the State Constitution would have been clearly void under articles 5 and 14 of the amendments of the Constitution of the United States, which provide that private property shall not be taken for public use without just compensation. [Railroad v. Smith, supra.] Such a provision would

be confiscatory in its nature and violative of the Constitution of the United States. Then by parity of reasoning, if it was not the intention to abolish all tariff rates, then it was not the intention to prohibit all discriminations. Clearly, it was the intention of the framers of the Constitution to abolish only unreasonable and extortionate rates, and all unjust and unreasonable discriminations in the transportation of freight and passengers. [Chicago & Alton R. R. v. People ex rel., 67 Ill. 11.]

The Constitution commanded the Legislature to enact such laws as would carry into effect those provisions, and in obedience to that mandate, and within the limitations prescribed, it attempted to enact such legislation as would prevent the collection of extortionate rates and from making unjust and unreasonable discriminations by fixing maximum rates; and in order to carry into effect those rates the Legislature also created the Board of Railroad and Warehouse Commissioners with power to regulate, fix and publish
144 schedules of tolls to be charged for transportation of freight and passengers, which were to be binding upon the companies until readjusted, or set aside by the judgment of some proper court, and by passing many other statutes prescribing the rights, powers and duties of such railroad companies. [R. S. 1899, secs. 1136-8; McGrew v. Railroad, 114 Mo. 240; Railroad v. Smith, supra; McCully v. Railroad 212 Mo. l. c. 17 and 18; Winsor Coal Co. v. Railroad, 52 Fed. 716; Cohn v. Railroad, 181 Mo. 30.]

Now, if our interpretation of the Act of 1872 is sound, and if viewed in the light of said constitutional provisions 12 and 14, then we are unable to see how it can be contended that said act either prohibits just or unjust discrimination, or that if that had been the invention of the Legislature, then it would have been invalid under those constitutional provisions, after their adoption. In brevity, I do not believe it was the intention of the Legislature, by the Act of 1872, to prohibit either just or unjust discrimination in the transportation of freight over railroads, for the reason that there is nothing in the body of the act which refers even remotely to that subject; but conceding, for argument's sake, that such was the intention of the Legislature, then, in my opinion, it was abrogated and annulled by the adoption of the Constitution of 1875. That being true, the act is void, first, because the title of the act refers to one subject, namely, "unjust discriminations," while the body of the act refers to an entirely different subject, to-wit, the short and long haul, which is a clear departure from the title of the bill, and for that reason it is obviously unconstitutional and void, because the subject of the act is not expressed in the title thereof, as commanded by section 32 of article 4 of the Constitution of 1865, and, second, because even if valid when enacted, it was repealed and annulled by the adoption of the Constitution of 1875.

145 This is not only the plain meaning of the language employed in the Act of 1872, and in the constitutional provisions mentioned, but it is the sound and common sense interpretation that has been placed upon them by the Board of Railroad and Warehouse Commissioners, and by every other State officer who has had any-

thing to do with the administration of the railroad laws, and by every railroad company in the State, from the time of the passage of the act and the adoption of the Constitution of 1875 down to the time of the institution of this suit, with one exception, and that exception is found in the case of McGrew v. Missouri Pacific Ry. Co., 177 Mo. 533, which will be considered in a subsequent paragraph of this opinion. I am, therefore, clearly of the opinion that the Act of 1872 was null and void, and had no force or effect at the time of the institution of this suit because of the three reasons before stated.

III. Aside from the foregoing observations regarding the interpretation and invalidity of the Act of 1872 in the light of sections 12 and 14 of the Constitution, those sections themselves demand a most careful consideration at the hands of this court.

This brings us to the consideration of whether there is a conflict, or seeming conflict, between those sections of the Constitution, and if so, what is the duty of this court in the premises?

Section 12 makes it unlawful for a railroad company to charge a greater amount "for a less distance than the amount charged for a greater distance;" and section 14 makes it the duty of the General Assembly "to pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State."

It is to be regretted that the proceedings of the Constitu-
146 tional Convention of 1875 have never been printed, so that the bench and bar could see the reasons given by the framers of the Constitution for the adoption of the different provisions thereof. If we had the time and opportunity to investigate the discussion of those matters, such investigation might prove most instructive; but in the absence of sufficient time and opportunity to make such an investigation, we must ascertain from the wording of those sections of the Constitution their true meaning.

On the face of the two sections there appears to be a seeming irreconcilable conflict. If section 12 is literally construed, it might be held to mean that all discriminations, as to the long and short haul, just as well as unjust, under all circumstances and conditions, are intended to be prohibited; in other words, to be a constitutional enactment similar to the Act of 1872. While on the other hand section 14 required the General Assembly to pass laws to correct abuses and prevent unjust discrimination.

If the framers of the Constitution had intended by section 12 to prohibit all species of discrimination, then section 14, requiring the General Assembly to pass laws to prevent unjust discrimination, was not only a work of supererogation, as before suggested, but also created a manifest incongruity in the organic law. For it could not be true that the lawmakers intended by section 12 to prohibit absolutely all discriminations, and yet by section 14 to authorize the General Assembly to pass laws that would simply prevent unjust discrimination. And the framers of that Constitution must have had in mind not only the Act of 1872, but the decision of Napton, J., in Sloan v. Railroad, 61 Mo. 31, holding that it was lawful for a car-

rier to make just discriminations where the circumstances and conditions were not the same. And likewise to have known that the Supreme Court of Illinois had recently decided that the Illi-
147 nois statute, from which the Act of 1872 was borrowed, was unconstitutional, because it attempted to prohibit just, as well as unjust, discrimination.

But whatever may have been the reason that actuated the members of the Constitutional Convention, the result is that there is an incongruity, an irreconcilable inconsistency, between sections 12 and 14 of article 12 of the Constitution, and there is nothing that can now be done except either to hold that the one cuts the throat of the other, and, therefore, the Constitution itself is a felo de se (O'Brien v. Transit Co., 212 Mo. l. c. 66, and cases cited), and neither obtains, or else have this court to reconcile the two. The two can only be reconciled by holding that prohibitions of section 12 are explained, modified and made consonant with the common law by the provisions of section 14. In other words, that the lawmakers explained in section 14 that by section 12 they only intended to prohibit unjust discrimination, and that what is an unjust discrimination is a question for the Legislature. This is perfectly obvious, for the reason that the very same section of the Constitution provides that the Legislature shall "pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger traffic." Why the latter provision, if section 12 was absolute and self-enforcing, as has been suggested? This idea is strengthened by the fact that section 12 itself also provides that the Legislature shall pass suitable laws to enforce its provisions, thereby showing the intention of the framers of the Constitution to delegate to the Legislature the power to reconcile the apparent conflict that exists between the two sections by enacting statutes which would avoid all extortion and unjust discrimination on the part of railroads, and at the same time protect the interests of the public and the roads themselves by permitting them to make just and reasonable discriminations under the sanction and
148 approval of the State Board of Railroad and Warehouse Commissioners. This view is supported by the decision of the Supreme Court of Illinois in the case cited of C. & A. Railroad v. People ex rel., 67 Ill. 11, and also by the decision in the case of Interstate Commerce Commission v. L. & N. Railway, 73 Fed. 409, construing the Interstate Commerce Act of 1887, wherein it was held that the transportation of goods involves the necessity of doing justice to three parties—the carrier, the trader and the public, the latter being the most important of all, because without that consideration, the carrier and the trader might be able to create a monopoly in respect to the necessaries of life by excluding competition from shippers at a greater distance from the point of consumption.

We conclude, therefore, that when sections 12 and 14 of the Constitution are construed together, it must necessarily be held that the framers of the Constitution did not intend to create any incongruity in the organic law, or intend to prohibit all discriminations in one breath, and only to prohibit unjust discriminations in the next, but that the intelligent lawyers and judges that composed the Constitu-

tional Convention of 1875 knew the prior state of the law, and intended only to legislate against, or provide against, unjust discrimination. Unless this be true, then we must convict those able gentlemen of a most lamentable mistake, and unless this be true, then sections 12 and 14 destroy and nullify each other.

But it has been suggested that in this case the judgment below can be sustained whether the Act of 1872 was repealed by the Act of 1887, or was substituted by the Act of 1887, or not, because section 12 of article 12 of the Constitution is self-enforcing, and any appropriate common law remedy can be invoked to enforce it, and no legislative aid is necessary. This view cannot be maintained, and at the same time give any possible effect to section 14 of article 12 of the Constitution and to the Act of 1887 passed pursuant thereto.

It cannot be true that the framers of the Constitution intended section 12 to be self-enforcing, and at the same time intended to take it the duty of the General Assembly to pass laws preventing unjust discriminations. The Governor of the State and the General Assembly of the State have obeyed the mandate of section 14 and have passed an act (1887) which carries out that requirement of the Constitution. Now it would be a solecism to say that the framers of the Constitution had enacted a law which would be self-enforcing, and which would prohibit all discriminations of every kind, under all circumstances and conditions, and at the same time to say that those learned lawmakers had also devolved a duty on the General Assembly to enact laws that would simply prevent unjust discrimination. It is likewise a solecism to say that one is absolutely prohibited from doing an act, and at the same time to say that he may do the act under certain circumstances and conditions.

The questions here presented for consideration and determination are not foreclosed by the decision of the Supreme Court of the United States in Louisville & Nashville R. R. Co. v. Kentucky, 183 U. S. 503. These questions and these conditions and contradictions between the acts of 1872 and 1887, and the provisions of section 12 and 14 of article 12 of the Constitution, were not present in that case. The Fourteenth Amendment to the Constitution of the United States guarantees to every person due process of law, and no case can be found decided by the Supreme Court of the United States, and certainly not the case of Louisville & Nashville R. R. Co. v. Kentucky, 183 U. S. 503, that holds that a person can be convicted of a crime for doing an act such as is prohibited by the Act of 1872 and by section 12 of article 12 of the Constitution, and at the same time not be guilty under the provisions of the Act of 1887 and under section 14 of article 12 of the Constitution. It cannot be true that any court could hold that a person could be guilty and not guilty at the same time, guilty under the Act of 1872 and under section 12 aforesaid, and not guilty under the Act of 1887 and under section 14 of article 12 aforesaid. Yet this is the condition presented in this case, and there is no solution for it that will stand the test of common sense, reason, logic or precedent, or that will be sanctioned, in my judgment, by the Supreme Court of the United States, if this case is taken into that court, as it probably will be, if the decision is

adverse to the appellant herein, unless this court holds that the Act of 1872 was repealed necessarily by the Act of 1887, and further holds that what seems to be an absolute prohibition against all manner of discrimination under section 12 of article 12 of the Constitution is modified and explained by the provisions of section 14 of article 12 aforesaid; in other words, that only unjust discriminations are forbidden under the Constitution and laws of this State.

IV. Having decided in paragraphs one and two of this opinion that the Act of 1872 is unconstitutional and void, and also by the latter that said sections 12 and 14 of the Constitution are not self-enforcing, we will now determine whether or not there are any valid laws in force which give efficiency to those sections.

Respondent bases his right of recovery upon sections 1126 and 1169 of the Revised Statutes of 1889, and contends that they put in operation those sections of the Constitution, and that they are in full force and effect; while upon the other hand appellant retorts by saying that said sections which are sections 1 and 4 of the Act of 72, brought forward and copied without change in the various revisions of the statutes from the time of their passage down to and including the Revised Statutes of 1889, and are there numbered as sections 1126 and 1169, are unconstitutional and void; and that the mere fact that they have been brought forward and copied into the various revisions did not breathe into them new life and validity.

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If we correctly understand learned counsel for respondent, he does not seriously contend that the Act of 1872 when enacted was constitutional and valid, but contends that sections one and four thereof which are sections 1126 and 1169 of the Revised Statutes of 1889 were re-enacted by an Act of 1879 revising and amending chapter 63, 64, 65 and 66 of the General Statutes of 1865, and by incorporating therein the entire Act of 1872 and passing the whole as an amended and revised bill.

The opinion of Valliant, P. J., sustains this contention of respondent by holding that "the General Assembly of 1879 passed an act entitled 'An Act to revise and amend chapters 63, 64, 65 and 66 of the General Statutes of Missouri, concerning corporations,' approved May 31, 1879, in which the sections we are now considering were included. Chapter 63 of the General Statutes of 1865 was one of the chapters so revised and amended and was entitled, 'Of Railroad Companies.' This section was germane to the subject of the chapter and was an amendment to it. The section does not rest therefore on the mere act of the legislative committee carrying it forward as in the case cited. [Hemsteck v. Railroad, 2000 Mo. 1. c. 568.]"

I have two criticisms to suggest regarding that clause of the opinion of my learned associate. First, that while section 1 of the Act of 1872 was properly re-enacted in 1879 and is now section 1126 Revised Statutes 1889, and upon which this suit is based, it was repealed by an Act of 1887. Second, that said sections 12 and 14 of the Constitution are not self-enforcing, and there is no statute or common law in force which prohibits reasonable and just discrimination by railroad com-

panies in the transportation of freight and passengers over their
152 roads under the direction and approval of the Board of Railroad and Warehouse Commissioners; but upon the other hand, the Act of 1887 expressly authorizes them to do so.

I will discuss these propositions in the order stated, but before doing so I wish to state in the first place that I am at a perfect loss to understand the motive which induced the plaintiff to institute and prosecute this suit, for the reason, as shown by the freight schedules, made and promulgated by the State Board of Railroad and Warehouse Commissioners (which are public records and of which we have the right to take judicial notice), the rates with which he was charged were, in every instance so far as I have been able to ascertain, less than the legal rates, and were evidently made for the purpose among others of enabling him to sell his coal in competition with the coal of mines located on other roads and in other states. If the reduced rates of which he complains had not been made by defendant he would not have been able to have marketed his coal, mentioned in this suit, in competition with coal from other mines, and would therefore have lost that trade, as will be presently shown. The defendant was also benefited by said reduced rates or it would not have made them, for the reason that it was thereby enabled to secure the transportation of said coal which it otherwise would not have been able to have done on account of the competition of other mines located on other and shorter roads. Clearly, this was the case at Booneville, where coal was going there from Lowery City and Bronnington over other roads; at Sweet Springs, where coal was going from Higginsville; and Joplin, where coal was going from various mines located in the State of Kansas. If the defendant company had not made the reduced rates complained of it would have meant that the mines located on the other roads and in different states would have monopolized the coal business at the points to which the reduced rates
153 were made, and that of course would have worked injury on those communities as well as upon the plaintiff by limiting his mine output, and upon the defendant by depriving it of the transportation of the coal, about which this suit was brought.

Clearly, the plaintiff was not damaged by those reduced rates; on, upon the contrary, by enabling him to sell at the places named, the output of his mines was greatly increased, and the cost per ton for mining was doubtless reduced, and consequently he was thereby enabled to get a higher price for his coal than he could have received had his output been curtailed to the extent of the quantity sold at said competitive points.

Since the defendant had to run its trains any way, and as it could not, as before shown, secure the transportation of this coal unless it reduced the rates to those competitive points, it was benefited by the business so long as the rates which it received were more than the expense of the transportation.

This record shows that these reduced rates enabled the plaintiff to do business at those competitive points against mines located on other roads and in other states, and if like reductions are to be made to all other, or non-competing points, the defendant could not

afford to make the reductions to plaintiff and others to the competitive points, for the reason that the loss incident to the general reduction would be much greater than the gain the defendant would derive from the plaintiff at the competitive points on account of the reduced rates. By consulting the geography of the State and the freight rates established by the State Board of Railroad and Warehouse Commissioners, it will appear that the towns to which the reduced rates were made for the benefit of the plaintiff would get their coal from other mines over other roads at a less cost; and no other point or person located on the Missouri Pacific could justly claim that he or it was injured by the company giving the
154 plaintiff the reduced rates mentioned, for the reason that those competitive towns would have the same rates from other roads whether the defendant made them or not; consequently no coal mine or other industry was or could be injured by the reduced rates made by the defendant to said competitive points.

But on the other hand, by the reduction of coal rates to the points mentioned, the Myrick coal mines were benefited, and the plaintiff was thereby enabled to keep more men employed at his mines, and his output was greatly increased, and consequently his cost per ton was materially reduced and he was thereby better enabled to sell coal at a profit than he otherwise would have been. So was the consumer or industry at the competitive points benefited by reason of the competition caused by plaintiff's coal; and the defendant was also benefited by getting the transportation of all coal shipped by plaintiff to those points. All of these are State institutions, which should be encouraged and supported by all legitimate means.

By again consulting the geography of the country, it will clearly appear that the Joplin coal rates complained of were made in competition with the coal and coal rates from the Cherokee and Pittsburg District of Kansas; and if our statute which provides that no less charge shall be made for a longer than a shorter haul were to prevail, as contended for by counsel for plaintiff, it would mean in many cases that the industries in other states and foreign transportation companies would thrive and wax fat at the expense of Missouri industries and carriers.

The close proximity of the Cherokee and Pittsburg coal district of Kansas to Joplin and neighboring Missouri towns is such that the Missouri coal mines could not market their products in any such town if it were not for said reduced rates, or if the long and short haul clause of the statute, as understood by some of my
155 associates, was enforced. So long as no one in Missouri is injured, our industries should certainly be enabled to do business even in all competitive towns and cities of this State as against outsiders, which clearly they could not do if the construction placed upon our statutes by counsel for plaintiff is correct.

We know from the common knowledge that the cost of mining coal in this State far exceeds the cost of mining it in the State of Illinois, and if Missouri coal mines are not given reduced rates to Boonville and other competing points, Illinois coal will surely sup-

ply their needs. This great difference in the price of mining coal in Illinois as compared with mining it in Missouri enables the former with much higher railroad rates to sell its products in this State even against the legal freight rates made from the Missouri mines. The Missouri mines, therefore, in order to be enabled to do any business in many towns of this State competing with the Illinois coal, it is necessary for the railroads to make them a lower rate than the legal rate; for instance, by an examination of the state and interstate rates it appears that the rate from the Illinois coal fields to Boonville is $1.95 per ton and to Marshall $2.10 per ton. Still this record shows that defendant has made a rate of forty cents per ton on coal from Myrick to Boonville, presumably in order to enable it to haul some of the coal that is consumed at the latter place. Otherwise, the Illinois mines would supply that city's entire demand.

Of course, it goes without argument that the defendant, like other railroad companies, is desirous of getting as high freight rates as it possibly can. Self-interest prompts it to do so, and when a railroad, therefore, voluntarily reduces the rates prescribed for it by statute or by the railroad commissioners, it must mean that it cannot otherwise procure the freight for transportation. Railroad companies understand the commercial conditions governing
156 the situation and that those conditions will not admit of transportation by them unless at reduced rates. Besides that, they understand that the communities they serve will be deprived of the advantages which flow from the successful operations of their industries. By making special or such reduced rates to meet those commercial conditions, the competition of other markets and of like or other commodities, they are conferring substantial benefits on those communities. If such reduced rates are not made, in all probability the business will not be forthcoming. Under such circumstances, it seems to me that carriers are justified in making such rates as will enable those communities to do business in competitive markets, provided there is no loss to them in the transaction; and it can be readily understood that if such reduced rates do not affect or influence the rates on other existing traffic, they can sometimes and under certain conditions be made very low before a loss will result therefrom.

Where a railroad plant and all facilities are already ample and sufficient to enable it to transport such freight without further expenditures, then it will be seen that the expense incurred in this particular transportation would not be in proportion to that of its regularly established business. The difference in the rail carriers' rates can sometimes be very great and it cannot be justly said that some are unreasonably high, or that others are unreasonably low, for the reason that the expense which a traffic under certain conditions adds to the already existing expenses may be covered by very low rates without injury to any community or locality, and yet the rates which it may be necessary to charge upon other traffic must of

necessity be higher so that the entire cost may be covered and the property be safely and successfully operated.

It is a common complaint made by the ordinary uninformed man, that the reduced competitive rates on through rates which
157 may be lower for a longer than for a shorter haul produce a loss to the railroads which they have to recoup or make back by charging higher rates for shorter hauls; that is to say, that they do the business in such cases for less than they can afford to do it for were they not able to make an unreasonably high profit from their local business. That is an erroneous idea. If the railroads did not take the competitive business at the low rates, it would mean they would not procure any of that business, and consequently they would lose just so much revenue as would be derived from its transportation had they procured it. For instance, suppose a competitive through business was offered at ten cents a hundred and that the same carrier was charging twenty cents a hundred for the short haul or intermediate points. Under such conditions it must take the through competitive business at ten cents or not take it all, for the reason that other roads which have shorter routes would take the business for the ten cents, which would be their local rate. The intermediate stations do not complain of the reasonableness of their rates, because the longer competing line does not take the through freight, yet they do not see that by doing so it would enable it to carry local shipments at a lower rate. By taking the business at the ten-cent rate there may not be as much profit to the longer road as there would be if it charged and could receive the local higher rates, but by reason of the fact that there is some profit in the business at the ten-cent or competitive rate, it can be justly said that such business adds to the receipts of the company more than to its expenses, and for that reason it is justified in engaging in said through business, provided by so doing it does not injure or affect the intermediate shipper or his business upon which the higher rates are charged. By reason of there being some profit in the business, if profit it may be called, it makes the cost of the entire business of the com-
158 pany less per unit and it is thereby better able to give lower rates to the intermediate points than it otherwise would be.

I gather from the reports of the Interstate Commerce Commission that approximately the following divisions may be made of the entire expense of maintaining and operating the railroads of the United States. One-third to pay interest on stocks and bonds; another third to be expended in maintaining stations and station grounds, salaries of the general officers, legal officers, division officers, station agents, clerks, telegraph operators, bridge men, section men, and all that class which it is necessary to retain whether the competitive through business is taken or not. In these, two-thirds of the expense which might be called a fixed expense goes on whether the railroad hauls ten million or thirty million tons of freight. The remaining third of the expense might be termed the movement expense, which consists of the wages of engineers, firemen, conductors and brakemen, locomotive and car repairers, fuel, oil, waste, water, and wear and

tear of rails, decay of ties, etc. As the competitive through traffic is offered at certain specified rates made by influences beyond the control of the carrier to change or affect, the question to be first determined is—will it pay this so-called movement expense? The other two-thirds of the expense of course goes on whether the through traffic is taken or not. Any sum received in excess of this movement expense is just so much more than can be applied toward meeting the fixed two-thirds expense, and the road is thereby enabled to make the burden lighter for the local or non-competitive traffic. The actual expense therefore attendant upon the transportation of competitive traffic which the railroad can secure only on condition that it charges certain specified rates made for it by outside influences entirely beyond its power to control, change or affect is the actual outlay which its movement necessitates.

It is thus seen that if the railroad plant and other facilities
159 are ample to enable it to transport such traffic without further outlays, the expense incurred will not be in proportion to that of its regularly established business, nor will the movement of competitive freight always incur the entire expense included in the several items before mentioned comprising the movement expense.

The movement expense of such traffic might be decreased materially according to the different conditions or exigencies that might arise. For instance, if the traffic was offered at a time when empty cars had to be returned, which at certain seasons of the year amount to thousands, the item of wages, fuel and other supplies, together with repairs of locomotives and cars, would not properly enter into the cost. The expense incident to these would be largely incurred with the movement of empty cars as well as with the loaded ones. Again, if the preponderance of tonnage was in the direction opposite to that which the competitive business was destined and such business enabled the carrier to load trains that would otherwise be hauled light or empty, the expense of the new competitive business would be inappreciable. Nor would this competitive business entail a proportionate share of the large expense of maintaining the track, bridges and culverts, which constitute a large part of this third of the movement expense. The wear and tear of these are not in direct ratio to the tonnage transported. The wear and deterioration caused by the action of the weather, the repairs, renewals and washings of embankments, of the masonry, ballast and road crossings, the decay of ties, the bridges and fences would go on just the same whether this competitive business was or was not hauled, so that it would not be proper to charge such extra business with a tonnage proportionate to the expense of their maintenance.

Bearing in mind those many influences, it will be observed that
many of the items comprising the movement expense already
160 incurred by the then existing business would not be changed by the addition of the new competitive traffic, and that the entire expense of its carriage would, in many cases be inappreciable.

From what has been said it will be seen that the difference in the rates of railroads can sometimes be very great, and yet it cannot be justly said of them that some are unreasonably high or others un-

reasonably low; that the expense which a traffic under certain conditions adds to the already existing expenses of a railroad may be covered by very low rates without injury to any community or locality, and yet the rates which it may be necessary to charge upon other traffic of necessity be higher in order that the entire cost may be covered and the property be safely and successfully operated. Any profit, therefore, which may be in the transportation of competitive traffic—and from what has been said as to the expense, we think it would be conceded that the rates would have to be exceedingly low before there was no profit—relieves the local traffic from so much of the burden of meeting the fixed steady expense, and so long as the receipts from this competitive traffic are in excess of the expenses incurred for its transportation, there can be no such thing as recouping loss on low rate competitive business by charging higher rates on local traffic, no matter how large a difference there may be between the two rates.

We might cite a case in point, which might arise, wherein a carrier by the reduction of rates enables an industry on its line to carry on its business by meeting the new commercial conditions that may spring up from time to time. For instance, the piping of gas and oil from the Kansas and Oklahoma fields to Kansas City and St. Joseph threatened to displace in those cities the sale of Missouri mined coal, especially that mined at remote points from those cities.

To relieve the situation the railroads came to the aid of the
161 coal mines and reduced the rates in some cases to nearly one-half the figures of the legal maximum rates, and thus enabled these mines to continue their business in those cities, which otherwise could not have sold a pound of coal in either of those markets. Nor could any intermediate station claim it was unjustly discriminated against by this act of the railroads; and if the railroads were obliged to make similar rates for corresponding distances on other portions of their lines, then, of course, it would mean that these reduced rates would have to be withdrawn, because the small profit derived from such reduced rates to those cities would be more than offset by the loss they would sustain by the reduced rates at the other places. In such case the coal mining industries of Missouri would be hurt—the railroad industry in so far as the coal traffic from the mines is concerned would be killed—the Kansas City and St. Joseph industries and other consumers would be crippled, but the Kansas and Oklahoma industries would be benefited by having a monopoly of the fuel business in those cities, and would command therefor higher prices from the consumer than they could otherwise get.

By consulting the Missouri Pacific time-tables and the Interstate Commerce reports, it will be seen that the defendant operates about sixteen hundred miles of railroad in the United States, and that about one-half of that mileage runs at right angles to its main line. Commercially, the city of St. Louis chiefly serves the towns embraced within one-half of defendant's entire mileage. The same time-tables and reports show that the distance from St. Louis to the principal towns on the lines via the Missouri Pacific is longer than that of any other road which runs from that city direct to them. If, therefore

the defendant desires to engage in the traffic of such towns, it will be obliged to make the same or lower rates to them as are made by the shorter-distance lines; but if it must observe the long and
162 short-haul principle of the statute at places not reached by the shorter lines, it may find that the loss from a reduction of rates to the noncompetitive points would be greater than the gain it hoped to derive from the business of the towns reached by the shorter lines—in which case it could not afford to engage in the business as against the shorter lines' rates. A case in exact point may be suggested. The distance from St. Louis to Springfield via the Frisco road is two hundred and thirty-nine miles, and via the Missouri Pacific it is four hundred and ninety-seven miles. In order to engage in the Springfield business, the defendant would be obliged to make rates not to exceed those charged by the Frisco for two hundred and thirty-nine miles; but more than this, if the long and short-haul principle, as announced by counsel for plaintiff, were to be enforced, it would have to reduce the rates back two hundred and fifty-eight miles, or until it came to a station on its line which is two hundred and thirty-nine miles distant from St. Louis. The question would then be presented as to whether it could not better afford to give up the Springfield business wholly to the Frisco rather than reduce its rates over a two hundred and fifty-eight mile stretch of country. It must be readily seen that no one would be benefited by the latter course; St. Louis and Springfield would practically have but one road to serve them instead of two, and the defendant would sustain the loss of the share of the business it might otherwise control to the city of Springfield. That is but one of the many like cases which would be produced in this State if the long and short-haul rule is to be observed, namely, the same situation would be produced at Joplin, Carthage, Aurora, Lamar, Nevada, Charleston, Delta and many other places too numerous to mention, if we should go to other roads. On the other hand, no one is or can be injured by the longer line being allowed to engage in the business at
163 such competitive points reached by the shorter line. The intermediate stations are not unjustly discriminated against or injured, for the reason that the lower rate would be effective by the shorter line to all junction stations whether the longer line chose to charge them or not.

The courts and Interstate Commerce Commission have rendered many decisions, which will be presently noted, on similar questions to this, and have invariably held that the discrimination must be unjust before the railroad is prohibited from making the lower rate for the longer haul.

Counsel for defendant in arguing this cause stated that if the long and short haul of the statute as understood by counsel for plaintiff was observed, the annual loss of about $600,000 would be entailed upon his client.

While that statement is no part of the record, yet we may use it for the purpose of illustrating the question in hand, and the great loss that would be visited upon defendant if that rule is to be enforced; and if capitalized at four per cent it would be equivalent to

wiping out of existence about $15,000,000 worth of defendant's property, and that too with no corresponding benefit to any one, but a positive injury to the competitive towns, as before shown. And that is not all, the same proportionate loss would be entailed upon all other railroads in this State.

The necessity of charging higher rates per mile over some divisions of a railroad than over others is recognized by the State Railroad and Warehouse Commissioners. In promulgating its schedule of maximum freight rates, effective March 1st, 1904, the commission authorized the railroads of this State to charge higher rates per mile between St. Louis and Kansas City on all roads located south of the Missouri Pacific's main line than on those roads situate north thereof. "Any one can readily understand that it costs
164 more to construct and operate a railroad in some districts of the State than in others, and it is but just that they should be compensated by charging higher rates in those districts.

The foregoing observations have been made for the purpose of showing that there is nothing connected with the construction and operation of a railroad which is inconsistent with the idea that just and reasonable discrimination may be made by a railroad company in the transportation of freight and passengers without doing injustice to or inflicting injury upon any shipper or community in the State, and for the purpose of showing what great loss would be entailed upon the railroads of the State and the public at large if such discrimination is not permitted. It should be borne in mind that the framers of the Constitution, as well as the Legislature which enacted the statute in question, were perfectly familiar with the then existing condition of things before mentioned, when the former framed the organic law of the State, and when the latter enacted said statute, and certainly they must have acted with that condition of things in mind; and to charge either of those august bodies with a design to prevent all discrimination, just as well as unjust, under the circumstances, would do it an injustice and reflect upon its honesty and intelligence.

Returning from this divergence to the two propositions previously stated. Standing alone the Act of 1872 and section 12 of article 12 of the Constitution prohibit all kinds of discrimination as to long and short hauls, just as well as unjust, and therefore change the common law in this respect.

The Act of 1887, as shown by its title, as well as its words and context, and section 14 of article 12 of the Constitution, are aimed only at unjust discriminations, and recognize that it is reasonable, proper and lawful to charge a different or greater compensation where the short haul differs in circumstances and conditions from the long haul, and also where the short haul is not in the
165 same direction, on the same line with the long haul. It is manifest, therefor, that two incompatible, inconsistent and antagonistic provisions of law are to be found in the Act of 1872 and section 12 aforesaid on the one side, and in the Act of 1887 and in section 14 of the Constitution aforesaid on the other side.

Can these conflicting statutes and provisions of the Constitution be harmonized, and if not which must prevail?

As to the statutes it is an invariable rule of law that if there is a conflict, the later one must prevail, for that is the last expression of legislative will. As to the Constitution a different question arises, for both provisions were adopted at the same time, and therefore both must be construed together, and all seeming conflict must be reconciled by construction. Otherwise, in cases of irreconcilable conflict, both would have to fail.

The framers of the Constitution of 1875 must be presumed to have known of the existence of the Act of 1872. Those learned gentlemen undertook for the first time to have the organic law treat of this subject, and they expressed their will in sections 12 and 14 of article 12 of the Constitution. From 1872 and from 1875 the lawmakers were silent in respect to this matter. In 1877 the Governor of this State called the attention of the General Assembly to these questions. The regular session did not act, and thereupon the Governor called a special session of the Legislature for the express purpose of legislating as to these questions, and that special session passed the Act of 1887. It was intended to be and purported to be a complete code of regulations pertaining to these questions. It was passed under a general law entitled, "An Act to Regulate Railroad Companies." It did not amend the Act of 1872, or refer to it in any way. Great stress is laid upon section 21 of the Act of 1887, wherein it is said: "This Act is not intended to repeal
166 any law now in force, unless in direct conflict therewith, but is intended to be supplemental to such laws."

But it will be observed that such language was wholly unnecessary and of no force, for if the Act of 1872 is in conflict with the Act of 1887, the Act of 1872 would be repealed by necessary implication, and the court would so hold whether the Legislature said so or not, and it was not within the power of the Legislature to make the Act of 1887 simply supplemental to the Act of 1872 if the Act of 1872 was in conflict with the Act of 1887. Those are questions of law to be decided by the courts and not by virtue of any expression of intention of the Legislature, for it is not a question of intention, but a question of conflict, and therefore a question of law.

So that the legislative declaration in section 21, instead of having any controlling effect upon the decision of these questions, shows on its face that the lawmakers themselves intended the Act of 1887 to be the law of Missouri, and that the law of 1872 should be considered repealed wherever it conflicted with the Act of 1887. At any rate the courts must decide what effect the Act of 1887 had on the Act of 1872.

The Act of 1887 necessarily repeals the Act of 1872, because the Act of 1872 prohibits just, as well as unjust, discriminations, and by section 1160, Revised Statutes 1899, punishes a violation of the act with a fine of one thousand dollars. On the other hand, the Act of 1887 simply prohibits unjust discrimination, and the charging of a larger sum for a short haul than is charged for a long haul, but qualifies that by limiting it to cases arising "under similar circumstances

and conditions" and "over the same line in the same direction." Section 12 of the Act of 1887 punishes a violation of that act by a fine of five thousand dollars. In addition to all of which, a fine provided under the Act of 1872 goes to the person aggrieved, whereas under section 14 of the Act of 1887 the five thousand dollar
167 fine goes to the school funds of the county where sued for. Moreover, under the Act of 1872 the person aggrieved is authorized to maintain the action, whereas under the Act of 1887 the action must be maintained in the name of the State of Missouri at the relation of the Board of Railroad Commissioners to the use of the school funds. And the person aggrieved is only entitled under section 10 of the Act of 1887 to recover three times the amount of the actual damages sustained by him, with a reasonable attorney's fee.

The result of all of which is that it is impossible to reconcile the Act of 1872 and the Act of 1887, both as to substance and as to procedure. For it cannot be true that it is an offense against the laws under the Act of 1872 to discriminate in any respect under any circumstances, and at the same time be true that under the Act of 1887 there may be a discrimination where the circumstances are not similar, where the conditions are different, or where the long and short haul are not in the same direction. And likewise it cannot be true that a railroad company can be fined one thousand dollars under the Act of 1872 to be paid to the party aggrieved for making any kind of a discrimination under any circumstances whatever, and at the same time not be guilty of any offense under the law of 1887, because the circumstances and conditions were different and the hauls were not in the same direction. It cannot be true that there can be two laws on the same subject, one of which makes an act a crime under all circumstances and conditions, and punishes it with one fine, and the other makes only certain qualified acts criminal and punishes them with a different fine, to go to a different purpose, and recognizes that other acts may lawfully be done.

In other words, it cannot be true that the Act of 1872, which prohibits all discriminations, just as well as unjust, under all cir-
168 cumstances and conditions, can be reconciled with the Act of 1887, which does not prohibit all discriminations, but only unjust discriminations, and then only when the circumstances and conditions were the same and when the haul was in the same direction. Or otherwise stated, it cannot be true that a person can be guilty under one act and innocent under the other. Yet such is the result unless the Act of 1872 is repealed by the Act of 1887.

It is thus seen that the Act of 1887 covers the entire field of discrimination in the transportation of freight and passengers by railroad companies, the tolls and compensation to be charged therefor, and prohibiting a greater charge for a shorter haul than for a longer one, under the same conditions; and not only prescribes the penalties to be imposed for the violation of the act but the manner of collecting all damages done to persons in consequence of such violation is prescribed also. Under this state of things this court has repeatedly and properly held that "a statute is impliedly repealed by a subsequent one revising the whole subject-matter of the first, and

intending to substitute the latter for the former." [State ex rel. v. Patterson, 229 Mo. 364; State v. Hickman, 84 Mo. l. c. 79; State v. Roller, 77 Mo. l. c. 129; Smith v. State, 14 Mo. 152; State v. Summers, 142 Mo. 586, l. c. 595; Yall v. Gillham, 187 Mo. 393; Merriweather v. Love, 167 Mo. l. c. 521.]

By closer analysis of the Act of 1887, which consists of twenty-six sections, it will be more clearly seen that the subject of said section 1126 was not only fully covered thereby, but all other phases of discrimination were legislated upon, and the most drastic penalties imposed. Section 4 of the Act of 1887 clearly refers to the short and long hauls mentioned in said section 1126, and under the above rule of construction it must be held that the former by implication repealed the latter. Said section 4 of the Act of 1887 (Laws 1887, Ex. Sess., p. 17), is as follows: "It shall be unlawful for any
169 such common carrier to charge or receive any greater compensation in the aggregate for the transportation of like kinds of property under similar circumstances and conditions for a shorter than a longer distance over the same line in the same direction; provided, however, that nothing contained in this section shall apply to the carriage, storage or handling of property, either free or at reduced rates, for the United States, for the State of Missouri, or for any fair, exposition, religious, scientific, benevolent or charitable purposes." These two sections are directly in conflict with each other. Section 1126 prohibits a railroad company absolutely, and without an exception or qualification, from charging more for a shorter than a longer haul on any part of its line in any direction, while section 4 of the Act of 1887 is not so sweeping and general in its provisions, but only makes it unlawful for railroad companies to charge a greater compensation for the transportation of property of like kinds under similar circumstances and conditions for a shorter than for a longer distance, over the same line in the same direction. I have italicized the provisions of the latter section which principally differentiate the two sections. Under section 1126 it would have been unlawful to charge a greater toll for the transportation of property of like kinds under dissimilar circumstances and conditions for a shorter than for a longer distance over the same line in the opposite direction, but clearly the language of section 4 would permit such greater charge, provided the conditions are dissimilar and the shipments are made in the opposite direction. It is thus seen that the Act of 1887 not only revises the entire Act of 1872 and the various sections of the various revisions, which are copies thereof, but it is also in direct conflict with and repugnant thereto.

As before stated, this court has repeatedly held that a later statute will repeal by implication a prior one, where the repugnancy
170 between them is such that they cannot stand together or be consistently reconciled. [Glasgow v. Lindell, 50 Mo. 60; Pacific R. R. Co. v. Cass County, 53 Mo. 17; State ex rel. v. Dolan, 93 Mo. 467.]

If section 1126 is still the law of this State, railroad companies cannot lawfully do the things which section 4 of the Act of 1887, which is the same as section 1134 of Revised Statutes of 1899, ex-

pressly authorizes them to do, to-wit, to charge a greater toll for shorter hauls than for longer ones, when the conditions are dissimilar and the shipments are made in opposite directions; but if the rule announced in the cases last cited is sound, then section 1126 and not 1134 is repealed by necessary implication. And this conclusion is in harmony with another line of decisions of this court which hold the last expression of the Legislature upon a given subject should prevail in case of a conflict between it and a previous statute. [State ex rel. v. Heiberg, 74 Mo. 410.]

Again, if it was not the intention of the Legislature to repeal the Act of 1872 (sec. 1126, R. S. 1889), which prohibited the charging of more for a shorter than a longer haul in any direction, why did it provide against the charging of more for a shorter than a longer haul when the shorter haul was embraced in the longer one? Section 1126 by its terms prohibited the charging of more for a shorter than a longer haul in all directions, and therefore prohibited the charging of more for a shorter than for a longer haul when a shorter haul was embraced in the longer haul. Section 1134 was superfluous if section 1126 remained in force.

The principle that when the mind of the Legislature is directed to a particular subject, its enactment must be presumed to be exhaustive of the legislative intent with respect thereto, should obtain. Any other conclusion would convict the Legislature of passing a vain and foolish act.

The second reason why I cannot concur with the opinion
171 of my learned associate is that sections 12 and 14 of article 12 of the Constitution are not self-enforcing, but expressly provide that the Legislature should enact suitable laws for the purpose of carrying into effect these provisions. To hold otherwise would be equivalent to expunging that mandate from these sections. Under that constitutional mandate, there has been but one act passed by the Legislature to give force and effect to those constitutional provisions which is now upon the statute books, and that is the Act of 1887, one section of which is the same as section 1134 of Revised Statutes of 1889. This section, as before stated, does not prohibit railroad companies from charging more for a shorter than for a longer haul, where the conditions are dissimilar, and the shipments are made in different directions.

This same question has many times been before the Interstate Commerce Commission, our Railroad and Warehouse Commissioners, as well as before various Federal courts. The former and the latter have invariably placed the same construction upon the long and short-haul clause of the Act of Congress covering the same question, as will appear from the following citations, that the Railroad and Warehouse Commissioners of this State have uniformly placed upon the statute under consideration.

The possibility that a discrimination may be just is recognized by section 2 of the Act of Congress, in declaring what shall be deemed unjust. [Interstate Commerce Commission v. Railroad, 145 U. S. 263.]

It was not the purpose of the Act to prohibit just discrimination

in the transportation of persons or property. [United States v. Railroad, 127 Fed. 785.]

The object of section 2 of the act is to prevent one shipper from getting advantage over another in the matter of rates, only where both make a substantially like offering to the carrier. [United States v. Hanley, 71 Fed. 672.]

172 When traffic is not of like kind, or when the service is not like and contemporaneous, or when the transportation is not rendered under substantially similar circumstances and conditions, difference in charges does not constitute unjust discrimination within the meaning of section 2 of the act. [Interstate Commerce Commission v. Railroad, 43 Fed. 37, 47.]

The language of the act recognizes that a uniform rate between different shippers is not always possible or proper; that the time of service, the kind of traffic, and the circumstances and conditions under which it is transported, may materially change the just obligations and duties of the carrier to its patrons. [United States v. Hanley, 71 Fed. 672.]

A carrier subject to the act is only bound to give the same terms to all persons alike under the same conditions and circumstances. Any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. [Interstate Commerce Commission v. Railroad, 141 Fed. 1003, 1011.]

In fixing rates for differing but analogous services, the carrier has the right to exercise an honest discretion. Trifling differences of cost or character of the services rendered do not justify disparity of charges; but where the differences are substantial, either in the work to be performed, or in the utility and value to the persons served, a fair relation of rates meets the carrier's obligation. [Carr v. Railroad, 9 I. C. C. R. 1, 11.]

Discrimination to be unlawful must be unjust. All discriminations between persons are not unlawful under section 2 of the act, but only such as are "unjust." [Interstate Commerce Commission v. Railroad, 43 Fed. 37, 47.] It is not all discriminations that fall within the inhibition of the act, but only such as are unjust or unreasonable. [Interstate Commerce Commission v. Railroad, 145 U. S. 263, 276.]

173 What constitutes unjust discrimination? In order to constitute unjust discrimination under section 2 of the act, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device; but in either case it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." [Interstate Commerce Commission v. Railroad, 145 U. S. 263, 281.]

What matters may or may not be considered in determining the question of discrimination? The provision that discrimination must not be unjust necessarily implies that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies,

and of the producers, shippers and consumers, should be considered by the commission in enforcing the provisions of the act. [Tex. & P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 219.]

Discrimination must consist in the doing for or allowing to one party or place what is denied to another; it cannot be predicated of action which in itself is impartial. [Crews v. Railroad, 1 I. C. C. R. 401, 1 I. C. C. R. 703.]

When through rates for a longer distance are controlled by competition between carriers, the reasonableness of local rates not so affected is not to be determined by comparison with the through rates. [Charlotte Shippers Assn. v. Railroad, 11 I. C. C. R. 108.]

Rates from St Louis, Nashville, Chattanooga to Hampton, Fla., were higher than rates from the same initial points to Palatka, Fla., the distance to Palatka being greater than that to Hampton. The rates to Palatka were fixed to meet competition at that point.
174 No such competition existed at Hampton. Held that the reasonableness of the Hampton rates were not to be determined by comparison with the rates to Palatka. [Interstate Commerce Commission v. Railroad, 120 Fed. 934, refusing to enforce order of Commission, 8 I. C. C. R. 503.]

The proportions received by the inland carriers of through rates on import traffic from foreign ports to inland points in the United States were considerably lower than corresponding rates on domestic traffic from ports of entry to the same inland points. The through rates were controlled by competition at the foreign ports. The commission, without considering such competition, ordered the inland carriers to cease carrying imported traffic at any other than the rates established on domestic traffic. Held, that the effort of the commission to deprive inland consumers of the advantage of through rates, thus to give an advantage to traders and manufacturers at the large seaboard cities, would seem to create a mischief which the act was intended to remedy; that among the circumstances and conditions affecting rates which the commission should have considered, as well in the case of traffic originating in foreign ports as that originating within the United States, was competition; that the acceptance of proportions of the through rates which were lower than the corresponding domestic rates was not an act of unjust discrimination. [Texas & P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, reversing I. C. C. v. Texas & P. Ry. Co.]

In deciding whether the proportions of through rates on import traffic, accepted by the inland carriers for haul from ports of entry to destination, were unlawful as compared with higher inland rates on domestic traffic between the same points. Held, that the commission should have considered the following facts: That the acceptance of import traffic enabled the carriers to take advantage of the preponderance of empty car movement from ports of
175 entry thus securing traffic for which any rates might be regarded as remunerative; that the through rates were affected by competition, both of ocean and inland carriers; that the through bills of lading furnished collateral for the transaction of business and

took from the shipper and consignee the care as to intermediate charges and cost of handling, thus helping to swell the volume of business; that the tendency of the through billing was to eliminate the obstacles between producer and consumer. [Texas & P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 206.]

The fact that a rate in one direction is materially higher than the rate on the same class of traffic over the same line between the same points in the opposite direction does not establish prima facie the unreasonableness of the higher rate. [MacLoon v. Railroad, 9 I. C. C. R. 642.]

The fact that a rate over a road or line in one direction is materially higher than the rate on the same class of traffic over the same road or line and between the same points in the opposite direction, does not, as in case of hauls over the same line in same directions, establish prima facie the unreasonableness of the higher rate. [Duncan v. Railroad, 6 I. C. C. R. 85, 103, 4 I. C. R. 385.]

Rate of 62 cents on "wool in the grease" was in effect from Philadelphia, Pa., to Fort Wayne, Ind. Rate on the same commodity from Fort Wayne to Philadelphia was only 31 cents. The movement of wool was almost wholly toward the East. Competition to secure east-bound traffic was therefore more intense than that resulting from efforts to secure occasional shipments to the West. On complaint that west-bound rate was unreasonable as compared with east-bound rate, held, that the circumstances were so dissimilar that the reasonableness of the former rate was not to be de-
176 termined by comparison with the latter. [Weil v. Railroad, 11 I. C. C. R. 627.]

Where, by reason of competition, rates to a longer distance point are lower than those in effect to a shorter distance point on the same line, the shorter distance being included within the longer, the reasonableness of the rates to the shorter distance point cannot be determined on mere comparison with those in effect to the longer distance point. [East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commission, 181 U. S. 1.]

The mere fact that rates to a longer distance point, which are controlled by competition, are reasonable, cannot be availed of as a ground for holding that rates to shorter distance points on the same line are unreasonable. [Interstate Commerce Commission v. Railroad, 88 Fed. 186, 195; affirmed 93 Fed. 83, 35 C. C. A. 217; 181 U. S. 29, refusing to enforce order of Commissioner, Rd. Com. of Ga. v. Clyde S. S. Co., 5 I. C. C. R. 324, 4 I. C. R. 120.]

As the petition in this case does not allege nor does the evidence disclose the fact that the shipments, mentioned in the petition, were all similar, and were made in the same direction, it fails to state a cause of action against the appellant, and the evidence fails to prove one, and for those reasons I believe the judgment should be reversed.

While dissenting in this case, I am not unmindful of the fact that Division No. 2 of this court has reached the same conclusion as those expressed in the opinion of Valliant, P. J., and while I feel like shrinking from the responsibility of running counter to the opinions of such eminent and experienced jurists, yet my sense of duty im-

pels me to state the reason for the faith that is within me. So far I have devoted much time in trying to show why the majority opinion is not sound, and will now proceed to make a few observations regarding the opinion delivered by Division No. 2 in the case of McGrew v. Mo. Pac. Ry. Co., 177 Mo. 533.

177 The first criticism I have to offer to that opinion is directed at the following paragraph on page 544: "Another and cogent reason why section 1131 should not be held to have repealed section 1126 is, that the latter was passed in obedience to the mandate of the Constitution itself, in section 12 of article 12 of that instrument."

This paragraph of the opinion contains an erroneous statement of fact regarding the enactment of section 1126, Revised Statutes 1899. The opinion states that it was "passed in obedience to the mandate of the Constitution itself." Now, the Constitution was not adopted until the year A. D. 1875, and an examination of the Laws of 1872, pp. 69 and 70, will show that the act of which section 1126 is an exact copy, was passed by the Legislature of 1872, which was three years prior to the adoption of the Constitution. That being true, it cannot be contended that said section was enacted in obedience to the command of the Constitution.

I, therefore, take it that if the fact upon which that portion of the opinion is based is erroneous, then the opinion in that particular must necessarily be erroneous also. And again, the Act of 1872 from which section 1126 is a copy, was unconstitutional and void at the time of its passage, and could in no manner form a sound basis upon which to rest that decision. Nor can we escape that conclusion by saying that said act was reenacted in 1879, for the manifest reason that it was repealed by the Act of 1887.

The second criticism I wish to suggest against that opinion is this: On page 543 the following language is used: "The first, or section 1126, Revised Statutes 1899, had and has for its object the regulation of freight charges in any direction, the same or opposite directions, on the same road and over any portion of the same road, regardless of 'circumstances or conditions,' and is in the language of the Constitution itself, article 12, section 12, supra; whereas

178 section 1131, Revised Statutes 1899, by its terms is limited to shipments over that part of the railroad 'in the same direction under similar circumstances and conditions,' and both can readily stand together." Now, that is clearly a misconception of the meaning of those two sections of the statutes. The word "any" as used in section 1126 means all, and when that section declares it unlawful for a railroad company to charge a greater compensation for transportation of freight for a shorter than for a longer distance in "any" direction on "any" part of its road, it means that it is unlawful for the company to make such charge for such services in all directions over its road. The word "any" as used in that section has the same meaning so far as directions are concerned as it has in a law or ordinance which declares it unlawful for a person to walk over a public flower garden in any direction, that is, walking in all directions over the garden is prohibited, and declared unlawful. That being

unquestionably true, and if section 1126 is still in force, as stated in that opinion, then a railroad company under section 1134 cannot make such charges for hauling like freight under dissimilar conditions, and in opposite directions, as is expressly authorized by that section, and the reason therefor would be, as heretofore stated, that section 1126 prohibits such greater charge for shipments in all directions; so it must logically follow that if section 1126 is still in force, then 1134 is not. These two sections are irreconcilably in conflict with and repugnant to each other. Yes, so much so, that if section 1126 is still in force, then the human mind can neither conceive nor state a case under section 1134 which would not violate section 1126. If such a thing can be done, I would like very much to see that case stated. Take the very facts stated in that opinion, and if section 1126 is in force, then defendant could not have interposed any defense whatever to it under section 1134, regardless of the
179 directions in which the shipments were made. In order to sustain that case, the court there said: "This court will take judicial cognizance that a shipment from Myrick to Kansas City was not in the same direction that the shipment from Myrick to Boonville was, but in fact, was in an opposite direction." Now, if that is true, and the fact that the shipments mentioned were in opposite directions fastened the liability upon the defendant in that case, then by parity of reasoning this court should in this case take judicial notice of the fact that shipments in this case from Myrick to Kansas City and those to Harrisonville are in the same direction so far as the line of railroad is concerned, and for that reason discharge the defendant in this case. But no, that cannot be done either, according to the opinion of Judge Valliant herein.

The effect of the two opinions is to find for Mr. McGrew, whether the shipments are made in the same or opposite directions. In either event the company must lose, yet, according to section 1134, it is entitled to win under the conditions stated therein, but under those two opinions those conditions can never transpire. It is, therefore, clearly seen that according to these two opinions section 1134, which is the later enactment, is repealed by section 1126, which is the prior enactment. I submit that in the very nature of things this cannot be done, and it is in conflict with the universal rule of construction, that where two statutes of different dates were enacted and are in conflict with each other, the one which was first enacted will be repealed by implication by the subsequent enactment and not vice versa.

Not only this, but by reading section 12 of article 12 of the Constitution, and section 1126, it will be seen that the opinion mentioned is in error when it says that section of the statute was enacted in
180 pursuance to the very mandate of the Constitution, and is in the language thereof. The language of the Constitution is as follows: "It shall not be lawful in this State for any railroad company to charge for freight or passengers a greater amount, for the transportation of the same, for a less distance than the amount charged for any greater distance." From this quotation it will be seen that said section 1126 is not only not in the language of the

Constitution, but is much broader in its provisions than those of the Constitution. If said section 12 of the Constitution was as broad in its provisions as are those of section 1126, and as stated in that opinion "has for its object the regulation of freight charges in any direction, the same or opposite directions, on the same road and over any portion of the same road, regardless of circumstances or conditions," then unquestionably section 1134 would be clearly unconstitutional and void, because it permits a greater charge for a shorter haul than for a longer one, where the conditions are dissimilar and the shipments are in different directions.

I have thus attempted to show that section 1126 was not enacted in response to the mandate of the Constitution, as stated in that opinion, and that it is much broader in its terms than are the provisions of said section 12 of the Constitution, and, therefore, it did not and could not prevent the Legislature in 1887 from repealing that section and enacting in lieu thereof section 1134.

This entire trouble and litigation has grown out of the erroneous assumption that section 1126 was enacted in response to the mandate of the Constitution, and that it is in the language thereof, and in holding all other acts and statutes upon the subject to be in subordination to that section; whereas, in fact, it was enacted three years prior to the adoption of the Constitution, and was clearly unconstitutional at the time of its passage, as before shown; and notwithstanding it was re-enacted in 1879, it was clearly and unquestionably repealed by the Act of 1887, now section 1134, Revised Statutes 1899, which latter act expressly authorizes the company to do just what the petition in the case charges it with doing, and is not, therefore, lawful.

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V. Counsel for respondent finally contends that appellant cannot raise any constitutional questions in this court, because they were not presented to the court below. As a general proposition that is true, but where the sole cause of action arises out of the violation of a statute which is unconstitutional, and there can be no recovery except by giving that statute force and effect, then its constitutionality can be raised at any stage of the proceedings, and in any court where the cause is pending, at any time.

The reason for that rule is that if the statute is unconstitutional and void, and that is the only law upon which the case can be predicated, then there is no law creating a cause of action, and consequently there can be no recovery. [State ex rel. v. Smith, 177 Mo. 69, l. c. 92; State ex rel. v. Smith, 152 Mo. 444; Ex parte Siebold, 100 U. S. 371; State ex rel. v. Smith, 141 Mo. 1; Kaukauna Co. v. Green Bay Co., 142 U. S. 254; Kirkwood v. Meramec Highlands Co., 160 Mo. l. c. 118.]

I am, therefore, of the opinion that the judgment should be reversed and judgment entered here for appellant.

Fox, C. J., and Burgess, J., concur.

182 No. 19150.

McGREW COAL COMPANY, Respondent,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Order Allowing Writ of Error.

The petition of The Missouri Pacific Railway Company, appellant, for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, together with an assignment of errors, citation, and bond for the prosecution of said writ of error, having been presented to the undersigned Chief Justice of the Supreme Court of Missouri; and upon examination and consideration of the said petition and of the record in said cause, the said writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri is hereby allowed, the said citation ordered issued, and the said bond in the sum of $2,000.00, with The Missouri Pacific Railway Company as principal, and Harvey C. Clark and James F. Green as sureties thereon, approved, this 10th day of February, 1920.

R. F. WALKER,
Chief Justice of the Supreme Court of the State of Missouri.

183 In the Supreme Court of the State of Missouri, October Term, 1919.

No. 19150.

McGREW COAL COMPANY, Respondent,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

The petition of The Missouri Pacific Railway Company, the above named appellant, (hereinafter called the petitioner) hereby sets forth that on the 22d day of December, 1919, the Supreme Court of the State of Missouri, En Banc, made and entered a final order and judgment herein, in favor of the above named respondent, and against this petitioner, in which final order and judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this petitioner, all of which will more in detail appear from the assignment of errors hereto attached and made a part hereof; that the Supreme Court of the State of Missouri is the highest court of the State of Missouri in which a decision in this matter could be had.

Wherefore, this petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the

Supreme Court of the State of Missouri, for the correction of the errors so complained of, and that a transcript of record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 10th day of February, 1920.

H. C. CLARK,
E. J. WHITE, &
J. F. GREEN,
Attorneys for Petitioner,
Plaintiff in Error.

183½ [Endorsed:] In the Supreme Court of Missouri. Case No. 19150. Div. —. McGrew Coal Company, Respondent, vs. The Mo. Pac. Ry. Co., Appellant. Petition for Writ of Error. Edw. J. White, Jas. F. Green & H. H. Larimore, Attorneys for Appellant.

184 In the Supreme Court of the State of Missouri, October Term, 1919.

No. 19150.

McGrew Coal Company, Respondent.

vs.

The Missouri Pacific Railway Company, Appellant.

Assignment of Errors.

Now comes The Missouri Pacific Railway Company, appellant, as a petitioner for a writ of error as set out in its petition, which is hereto attached, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Missouri in the above-entitled cause there is manifest error, in this, to-wit:

I. That the Supreme Court of the State of Missouri erred in holding in its decision that Sections 3173 and 3211 of the Revised Statutes of the State of Missouri, 1909, were not in violation of Section 1 of Article Fourteen of the Amendments to the Constitution of the United States, and in holding that said sections of Revised Statutes of Missouri do not deprive appellant of its property without due process of law and deny to it the equal protection of the laws.

II. Because the Supreme Court of the State of Missouri, in its judgment and decision entered in this cause, erred in holding that Section 12 of Article Twelve of the Constitution of Missouri adopted in the year 1875, was not and is not in violation of Section 1 of Article Fourteen of the Amendments to the Constitution of the

United States, in holding that said provision of the Constitution of the State of Missouri did not, and does not deprive appellant railway company of its property without due process of law, nor deny to appellant the equal protection of the laws.

III. Appellant avers that the decision of the Supreme Court of the State of Missouri and the judgment of said Court in Banc in the above cause, in reaffirming and following the former decisions of the Supreme Court of said State in the cases of McGrew v. Railway Co., reported in 230 Mo. 396, and McGrew v. Railway Co., reported in 258 Mo. 23, deprive this appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

IV. Appellant avers that Sections 3173 and 3211 of the Revised Statutes of the State of Missouri prohibit discrimination in all cases without regard to whether such discrimination is just or unjust, and the decision of the Supreme Court of the State of Missouri, in this case, holding said sections of the Statute constitutional and valid, deprives appellant of its property without due process of law and denies to it the equal protection of the law, in violation of Section 1 of Article Fourteen of the Amendments to the Constitution of the United States.

V. Appellant further says, that the Supreme Court of Missouri erred in overruling appellant's motion for rehearing in this cause, in which motion it was averred that the decision of the Court denied to appellant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

VI. Because, under the Supreme Court's interpretation of Section 12, Article XII of the Missouri Constitution, holding that said section of the Missouri Constitution is self-enforcing, notwithstanding said Section 12, Article XII of the Constitution provides: "And suitable laws shall be passed by the General Assembly to enforce this provision," the decision in this case results in a repeal of that portion of Section 12, Article XII of the Missouri Constitution by judicial interpretation, and, in holding that appellant in the exaction of a greater charge for the transportation of freight for a shorter distance than for a longer distance had violated said section of the Constitution of Missouri, appellant was denied its property without due process of law in violation of Section 30, Article II of the Constitution of Missouri and of the Fourteenth Amendment to the Constitution of the United States.

VII. Because the Court permitted the respondent to recover under the Constitution of the State, Section 12 of Article XII, whereas in his petition he sought a recovery under Section 3173, Revised Statutes of Missouri for 1909, and no recovery is sought in the petition under Section 12, Article XII of the Constitution of Missouri; and, said section of the statute having been held unconstitutional by this Court in the case of Sloan v. Pacific Railroad, 61 Mo., 24, ever since said decision the law thereof has become a rule of property in

this State, and to permit a recovery by the respondent under the Constitution in a case in which a recovery was only sought in the petition under said unconstitutional section of the Missouri statutes denies the appellant the equal protection and benefit of the laws and due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

VIII. Because the Supreme Court of Missouri, in the case of Sloan v. Pacific Railroad (61 Mo. 24), held what is now section 3173, Revised Statutes of Missouri for 1909 unconstitutional
187 as applied to the charter of the Pacific Railroad of Missouri, to which charter and franchise from the State the appellant in this case has succeeded as a property right, and, by permitting a recovery in this case under said section of the statute, in view of the transfer and assignment of the charter of the Pacific Railroad Company, as so interpreted in the Sloan case, to the appellant, the decision in this case impairs the obligation of appellant's charter and contract with the State, in violation of Section 15, Article II of the Constitution of Missouri and Section 10, Article I of the Constitution of the United States.

IX. Because the Court erred in holding that appellant was guilty of any discrimination in this case in exacting and putting into effect the statutory rates and charges approved by the Public Service Commission of the State of Missouri, in pursuance of the Public Service Commission Law of 1913, since said statutory rates and charges are the only lawful charges which the appellant could exact from the respondent; and, in holding in this case that the appellant had violated the law in putting said statutory rates and charges into effect, or that the exaction of such rates and charges could result in any wrongful act on appellant's part, the decision in this case denies the appellant the benefit of the equal protection of the laws and due process of law as applied to all other citizens of the State of Missouri, in violation of the Fourteenth Amendment to the Constitution of the United States.

X. Because, under the charter granted to the Pacific Railroad Company of Missouri by the Legislature of the State of Missouri in the year 1849 (Acts 1849, p. 219), to whose charter rights appellant has succeeded, the said railroad company was given the right to receive such tolls and freight charges as should be determined by the directors of said company, and said Section 3173 of the Revised Statutes of Missouri 1909, and Section 12 of Article
188 XII of the Constitution of Missouri impair the obligation of the contract which had in 1849 been entered into between the State and the Railroad Company, in violation of Section 10 of Article I of the Constitution of the United States.

XI. Because the Supreme Court of Missouri erred in adopting as its decision the opinion of Commissioner Brown, holding that respondent can recover in this case without proof of any damage sustained by him, and in holding that under the Constitution of the State of Missouri discrimination by railroads has been prohibited

all cases, without regard to whether such discrimination is just or unjust, reasonable or unreasonable, and the decision by the Court in this cause deprives appellant of its property without due process of law and denies to it the equal protection of the law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

HENRY C. CLARK.
EDWARD J. WHITE.
JAMES F. GREEN.
Attorneys for Appellant.

188½ [Endorsed:] In the Supreme Court of Missouri. Case No. 19,150. Div. —. McGrew Coal Company, Respondent, vs. The Mo. Pac. Ry. Co., Appellant. Assignment of Errors. Edw. J. White, Jas. F. Green, H. H. Larimore, Attorneys for Appellant.

189 (Copy.)

In the Supreme Court of Missouri, October Term, 1919.

No. 19150.

McGrew Coal Company, Respondent,

vs.

The Missouri Pacific Railway Company, Appellant.

Know all men by these presents, That we, The Missouri Pacific Railway Company, as Principal, and Harvey C. Clark and James F. Green, as Sureties, are held and firmly bound unto McGrew Coal Company in the sum of Two Thousand Dollars ($2,000) to be paid to said McGrew Coal Company, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Signed with our seals and dated this 10th day of February, 1920.

The condition of the above obligation is such that:

Whereas, at the October Term, 1919, of the Supreme Court of the State of Missouri, En Banc, in a suit pending in said Court, wherein McGrew Coal Company was respondent and The Missouri Pacific Railway Company was appellant, judgment was rendered against the said appellant; and The Missouri Pacific Railway Company, Appellant, having obtained a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, for the purpose of reviewing and securing a reversal of the judgment in the aforesaid suit, and a citation directed to said respondent, citing and admonishing it to be and appear at a term of the Supreme Court of the United States, to be held at Washington, D. C., not exceeding thirty days from and after the date of the citation in said cause;

Now, therefore, if the said appellant shall prosecute said writ
1189 of error to effect, and shall answer all damages and costs if it fails to make good its plea, then the above obligation to be void; otherwise to remain in full force and effect.

This obligation is not intended to in anywise affect the continuing liability of the principal and sureties on a bond heretofore given in the Circuit Court of Lafayette County upon an appeal taken by the Missouri Pacific Railway Company to the Supreme Court of Missouri from a judgment rendered in said Circuit Court against said Company in favor of the McGirew Coal Company, which judgment has been affirmed in said Court.

THE MISSOURI PACIFIC RAILWAY COMPANY,
By J. G. DREW,
H. C. CLARK,
JAMES F. GREEN.

Approved by me,
R. F. WALKER,
Chief Justice of the Supreme Court of Missouri.

1191 STATE OF MISSOURI, *ss:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings, and of the papers filed, in the cause entitled McGirew Coal Company, Respondent, vs. The Missouri Pacific Railway Company, Appellant, No. 19,150, as fully as called for and designated in the within precipe for record, and as fully as the same remain of record and on file in my office, and that the copy of the opinion of the Supreme Court of Missouri in Banc, in case of McGirew v. The Missouri Pacific Railway Company, 230 Mo. p. 486, made part of said transcript, as directed in said precipe, is full, true and complete.

In Testimony Whereof, I have hereunto set my hand and attached the official seal of said Supreme Court of the State of Missouri, at my office in the City of Jefferson, State aforesaid, this 20th day of February, 1920.

[Seal of the Supreme Court of Missouri.]
J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.

Endorsed on cover: File No. 27,529. Missouri Supreme Court Term No. 765. The Missouri Pacific Railway Company, plaintiff in error, vs. McGirew Coal Company. Filed March 2d, 1920. File No. 27,529.

Office Supreme Court, U. S.
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JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

October Term, 1919.

No. 265

THE MISSOURI PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

v.

McCREW COAL COMPANY.

Motion by Defendant in Error to Vacate Supersedeas, and Brief in Support Thereof.

EDWIN A. KRAUTHOFF,
Attorney for Defendant in Error.

ARGUS & KRAUTHOFF & BOY, LAW PRINTERS, DENVER.

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Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 765.

THE MISSOURI PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,
v.
McGREW COAL COMPANY.

Motion to Vacate Supersedeas.

Defendant in error, McGrew Coal Company, moves this Court to vacate the approval of the bond taken as a supersedeas herein by the Honorable Chief Justice of the Supreme Court of Missouri, and for grounds of such motion, does aver:

On April 20, 1915, in the Circuit Court of Lafayette County, Missouri, at Lexington, a judgment was entered in favor of McGrew Coal Company against The Missouri Pacific Railway Company for $14,303.77 (Rec. pp. 5-11).

An appeal bond was given in that Court for $28,000 and an appeal taken to the Supreme Court of Missouri (Rec. pp. 11, 12). The appellate court affirmed the judgment of the Circuit Court on December 22, 1919 (Rec. p. 37).

A writ of error was allowed by the Chief Justice of the Supreme Court of Missouri (Rec. p. 109) and a

bond approved, in terms of a supersedeas, in the sum of $2000 (Rec. pp. 109, 113). This bond contains the provision:

> "This obligation is not intended to in any wise affect the continuing liability of the principal and sureties on a bond heretofore given in the Circuit Court of Lafayette County upon an appeal taken by the Missouri Pacific Railway Company to the Supreme Court of Missouri from a judgment rendered in said Circuit Court against said company in favor of the McGrew Coal Company, which judgment has been affirmed in said Court" (Rec. p. 114).

The parties to the bond given on appeal from the trial court are not parties to the bond on the writ of error in this Court.

EDWIN A. KRAUTHOFF,
Attorney for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 765.

THE MISSOURI PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,
v.
McGREW COAL COMPANY.

Brief in Support of Motion.

The judgment sought to be reviewed on this writ of error was entered more than five years ago in the sum of approximately $14,000. It bears interest from that date at the rate of 6 per cent per annum.

R.S., Mo., 1909, sec. 7181.

The supersedeas bond is in the sum of $2000. Accordingly this question arises: Having regard to R.S. sec. 1000, Rule 29 of this Court, and the fact that an appeal bond sufficient in amount was given on appeal from the State Circuit Court to the Supreme Court of the State, is the amount of the bond taken on the writ of error pending in this Court sufficient? And what is the power of this Court in the premises?

R.S. sec. 1000, requires a judge signing a citation on any writ of error to "take good and sufficient security that the plaintiff in error . . . shall prosecute his writ . . . to effect, and if he fail to make his plea good, shall

answer all damages and costs, where the writ is a supersedeas."

Rule 29 of this Court provides:

> "Supersedeas bonds in the district courts and Circuit Courts of Appeals must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal."

It is respectfully submitted, that the rule does not apply to a writ of error sued out to a State Court.

The rule was made at December Term, 1867 (6 Wall. v).

We shall first take up the cases in this Court prior to the announcement of the rule.

In *Martin* v. *Hunter's Lessee* (1816), 1 Wheat. 304, 361, it was ruled that if any party was prejudiced by the omission of the judge who granted the writ of error to take the bond required by law, "this court can grant him summary relief, by imposing such terms on the other party as, under all the circumstances, may be legal and proper."

In *Catlett* v. *Brodie* (1824), 9 Wheat. 553, a motion was filed to dismiss a writ of error for want of a sufficient bond. The Court required a bond to be given, "the amount of such security to be sufficient to secure the whole judgment, in the case the same shall be affirmed, and be not otherwise discharged."

These two cases are cited:

Bryan v. *Bates*, 12 Allen (Mass.), 201, 213.

In *Black* v. *Zacharie* (1845), 3 How. 483, a Circuit Court of the United States granted a supersedeas, and then vacated it on the ground the "bond was considered as insufficient" (p. 493). The judgment sought to be superseded was in the sum of $8000; the penalty of the bond, $500. In this Court the plaintiff in error moved that a writ of supersedeas issue on the bond given. This motion was overruled. "The judges of the circuit court were the sole and exclusive judges what security should be taken for that purpose; and they have decided that the security offered was insufficient" (p. 495).

In *Stafford* v. *Union Bank* (1853), 16 How. 135, *Catlett* v. *Brodie*, *supra*, was cited and followed. No mention is made of *Black* v. *Zacharie*, *supra*. In the Staf-

ford case, the judgment sought to be superseded was in the sum of $65,256.52; the bond tendered in the sum of $10,000. A District Court of the United States approved the bond and ordered it to operate as a supersedeas (p. 137). It was ruled: "There is no discretion to be exercised by the judge taking the bond, where the appeal or writ of error is to operate as a *supersedeas*" (p. 140). The decree entered in the Stafford case was one of foreclosure of a mortgage on personal property, the proceeds of which were in the hands of a receiver. The Court said: "Suppose the appellant had given ample personal security on the original obligation for the payment of the money, and the sureties were sued with the principal, would they be excused from giving bail on an appeal or writ of error, as the act requires?" (140). The appeal bond was held insufficient to operate as a supersedeas. See also s.c., 17 How. 275.

In *Anson* v. *Blue Ridge R.R. Co.* (1859), 23 How. 1, no appeal bond having been given at the time of the granting of the appeal, leave was given to file one; in default of which the appeal was ordered to be dismissed.

> "Whenever a defendant sues out a writ of error, and he desires that it may operate as a supersedeas . . . he must give bond with sureties to the satisfaction of the court, for the benefit of the plaintiff, in a sum sufficient to secure the whole judgment in case it be affirmed."
>
> *United States* v. *Dashiel* (1865), 3 Wall. 688, 701, citing *Catlett* v. *Brodie* and *Stafford* v. *Union Bank*, *supra*.

In *Davidson* v. *Lanier* (1866), 4 Wall. 447, it was urged that the appeal bond had not been approved by the judge of the trial court. "The Judiciary Act does not, in terms, require that the judge shall put his approval of the bond in writing, nor can a writ of error be treated as a nullity because sufficient security is not given. This court will take care, on application, that the rights of the defendant in error be not prejudiced by the omission, but will not dismiss the writ except on failure to comply with such terms as it may impose" (p. 454); citing *Martin* v. *Hunter's Lessee* and *Catlett* v. *Brodie*, *supra*.

In *Rubber Co.* v. *Goodyear* (1867), 6 Wall. 153, 156, it was ruled on a motion to reduce the amount of a bond for supersedeas: "The question of sufficiency must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal, this question, as well as every other in the cause, becomes cognizable here.

> "It is, therefore, matter of discretion with this court to increase or diminish the amount of the bond, and to require additional sureties or otherwise as justice may require."

That case is evidently the occasion for the entry of Rule 32, now Rule 29, of this Court (6 Wall. v). By its terms the rule is not applicable to a State Court.

> "Rule 29 was passed contemporaneously with the decision in Rubber Co. v. Goodyear, 6 Wall. 153, 18 L. Ed. 762 (see this stated in Jerome v. McCarter, 21 Wall. 17, 30, 22 L. Ed. 515), and in order to quiet disputes which had prevailed in the

Supreme Court itself as to whether the rule in Catlett v. Brodie, 9 Wheat. 553, 6 L. Ed. 158 (an action at law), applied to equity suits, and especially to foreclosures, ejectments, etc."

Rederiaktiebolaget Amie v. *Universal Transp. Co.* (1917), 245 Fed. Rep. 282, 284.

In *French* v. *Shoemaker* (1870), 12 Wall. 86, 99, the rule quoted (6 Wall. 156, *supra*), was re-stated with approval, citing Rule 32.

See also *Bigler* v. *Waller* (1870), 12 Wall. 142, 149.

Rule 29 is cited: *Telegraph Co.* v. *Eyser*, 19 Wall. 419, 426.

Jerome v. *McCarter* (1874), 21 Wall. 17, was a suit in equity determined in a Federal Circuit Court. The appellee filed a motion to require the appellant to increase the appeal bond. The Court said of *Catlett* v. *Brodie*, *supra*: "That was a judgment in an action at law for the recovery of money not otherwise secured, and the decision established a rule of practice for that class of cases" (29).

In that case (21 Wall. 31), the Court said: "But upon facts existing at the time the security was accepted, the action of the justice within the statute and within the rules of practice adopted for his guidance is final."

It is respectfully submitted the rule thus announced is not applicable to common-law actions.

In *Martin* v. *Hazard Powder Co.* (1876), 93 U.S. 302, it was ruled: "The showing made in this case does not satisfy us that the alleged insufficiency of the security taken when the writ of error was sued out, arises from any change in the circumstances of the sureties since the acceptance and approval of the bond." That case has no relation to the amount of the penalty of a supersedeas bond.

Ex parte French (1879), 100 U.S. 1, 5, cites *Jerome* v. *McCarter, supra.* The Court said of a money judgment: "So far as the money parts of the judgment are concerned, they [the bonds] are far in excess in each instance of the amount recovered against the several defendants who seek the stay."

As to the damages accruing pending the appeal on account of the detention of the property sued for, the Court said: ". . . we decided in *Jerome* v. *McCarter* (21 Wall. 17) that the amount of the bond rested in the discretion of the judge or justice who signed the citation or allowed the *supersedeas*, and would not be reconsidered here" (5).

It was further ruled: ". . . the rules of practice are satisfied if the indemnity is commensurate with the damages that may follow from the stay which is effected" (5).

In *Railroad Co.* v. *Schutte* (1879), 100 U.S. 644, the approval fraudulently procured of a supersedeas bond was vacated.

The subject is considered in *Draper* v. *Davis* (1880), 102 U.S. 370, citing *Jerome* v. *McCarter* and *Railroad*

Co. v. *Schutte, supra.* It was held (371), that ". . . in the absence of fraud, the action of the justice or judge in accepting the security, within the statute and within our rules adopted for his guidance, was final, so far as it depended on facts existing at the time the security was accepted." *Draper* v. *Davis* was a suit in equity in a Federal Court.

See 105 U.S. 266.

Supervisors v. *Kennicott* (1880), 103 U.S. 554, was a suit on an appeal bond given in a suit to foreclose a mortgage. Damages limited to "such only as followed from the delay in the sale of the [mortgaged] property" pending the appeal (557).

The subject now under discussion is illuminated by the learning and ability of Mr. Justice Bradley, *Koontze* v. *Omaha Hotel Co.* (1882), 107 U.S. 378, an action on an appeal bond given in a suit to foreclose a mortgage. Practically all the cases cited in this brief, *supra*, are noticed and a rule laid down for the admeasurement of damages in such a suit.

In *Johnson* v. *Waters* (1882), 108 U.S. 4, the Court is careful to point out, on a motion for additional security on an appeal bond: "It does not appear from the motion papers that the decree appealed from is collectible under ordinary execution."

New Orleans Ins. Co. v. *Albro Co.* (1884), 112 U.S. 506, is a writ of error to a Federal Court. The trial judge accepted sureties severally bound for a specified part of a money judgment, and not jointly bound for the whole. "It being within the discretion of the

[trial] judge to accept such a bond as security, his action in that particular is final, and, under the rule laid down in *Jerome* v. *McCarter*, 21 Wall. 17, not reviewable here" (507).

In *Harwood* v. *Dieckerhoff* (1885), 117 U.S. 200, it is pointed out, on a motion to increase an appeal bond taken on an appeal from a decree in equity in a Federal Court: "No personal decree is asked."

Mexican Constr. Co. v. *Reusens* (1885), 118 U.S. 49, arose on error to a Federal Court in an action of attachment, in which defendant in the trial court had given an undertaking to pay the judgment that might thereafter be rendered. On the writ of error, a supersedeas bond was given with two sureties. A motion was filed to compel plaintiff in error to furnish additional security, because the bond given to pay the judgment was executed with only one surety. Motion denied, citing *Jerome* v. *McCarter*, *supra*.

Hudson v. *Parker* (1894), 156 U.S. 277, is in form a mandamus to compel a trial judge to admit a plaintiff in error, on a writ of error from this Court, to bail pending the hearing on the writ. The Court said: "Upon a writ of error in a civil case, the requisite security is ordinarily taken by the justice or judge who allows the writ and signs the citation. *Jerome* v. *McCarter*, 21 Wall. 17. But where the bond taken is insufficient in law, this court, in the exercise of its inherent jurisdiction as a court of error, may direct that the writ be dismissed, unless the plaintiff in error gives security sufficient in this respect, to be taken and approved by any justice or judge who is authorized to al-

low the writ of error and citation. *Catlett* v. *Brodie*, 9 Wheat. 553, 555; *O'Reilly* v. *Edrington*, 96 U.S. 724" (287).

In the last-named case (*O'Reilly* v. *Edrington*) the Court said, of an appeal bond approved by a clerk, not the judge: ". . . the case is a proper one for the application of the rule by which this court sometimes refuses to dismiss appeals and writs of error, except on failure to comply with such terms as may be imposed for the purpose of supplying defects in the proceedings," citing *Martin* v. *Hunter's Lessee*, *supra* (96 U.S. 726).

In *Pease* v. *Rathbun-Jones Eng. Co.* (1916), 243 U.S. 273, 280, *Catlett* v. *Brodie*, *supra*, is cited as authority for the proposition that a supersedeas bond in common form, ". . . binds the surety, upon affirmance of a judgment or decree for the mere payment of money, to pay the amount of the judgment or decree" (280). Rule 29 is cited and construed.

In *Hatch* v. *Coddington* (1867), Fed. Cas. 6205, the bond on writ of error was in approximately the amount of the judgment in the trial court.

In *American Nicholson Pavement Co.* v. *Elizabeth* (1874), Fed. Cas. 310, it was pointed out that in *New Jersey Zinc Co.* v. *Wetherill*, Fed. Cas. 17,464, the bond was required to be in the amount of the judgment appealed from, plus interest and damages for delay pending appeal and costs.

In *Fuller* v. *Aylesworth* (1896), 75 Fed. Rep. 694, the opinion is by Taft, J., Lurton and Hammond, JJ.,

concurring. The case was a writ of error to review a judgment rendered on a bond given to supersede a money judgment. The question arose on the measure of damages. "The court below held that the lawful effect of the bond was to require the obligors to pay the full amount of the judgment which was superseded. . . ." The term "otherwise secured" within the meaning of Rule 29 of this Court was construed to refer to cases "in which the court has, by reason of a lien on property secured to plaintiff otherwise than by the judgment or by reason of actual custody of property liable to satisfy the claim asserted, the means of making the claim of the plaintiff by subjecting specific property" (75 Fed. Rep. 701).

Judge Taft referred (75 Fed. Rep. 702) to certain remarks made by Judge Treat on the authority of Mr. Justice Miller (10 Cent. Law J. 193), as supporting the conclusion announced through him.

In *McClellan* v. *Pyeatt* (1892), 49 Fed. Rep. 259, 260, it was held (C.C.A.): "If there are defects in the bond, we have undoubted authority to allow a bond to be given which shall cure such defects."

> Citing *Brown* v. *McConnell* (1888), 124 U.S. 489.

When an appeal has been taken, the control of the appeal bond is in the appellate court.

> *Morrin* v. *Lawler* (1899), 91 Fed. Rep. 693.
> *Walker* v. *Houghteling* (1900), 104 Fed. Rep. 513.

". . . and a motion to increase the bond on the

writ of error could have been addressed to the appellate court, if so desired."

Clarke v. *Eureka County Bank* (1904), 131 Fed. Rep. 145.

If the supersedeas bond "does not sufficiently safeguard the interests of the appellee, the appellate court is always open to him."

Shelby &c. Co. v. *Delaware &c. Co.* (1908), 161 Fed. Rep. 798, 800.

In *Wilmer* v. *Ry. Co.* (1875), Fed. Cas. 17,775, Rule 32, now 29, was applied to an appeal in a suit to foreclose a mortgage in a Federal Court.

To like effect: *Duncan* v. *Railroad Co.* (1879), Fed. Cas. 4139.

In *United States, ex rel.*, v. *Mayor* (1881), 8 Fed. Rep. 112, the judgment sought to be superseded was held to be otherwise secured, within the analogy of Rule 29 (note 75 Fed. Rep. 702).

See also 42 Fed. Rep. 750.

Louisville &c. Ry. Co. v. *Pope* (1896), 74 Fed. Rep. 1, 7 (on appeal).

Per contra, The Holladay Case (1886), 28 Fed. Rep. 117.

The Sydney (1891), 47 Fed. Rep. 260, follows *Catlett* v. *Brodie, supra*, as to the measure of damages on a bond given to supersede a money judgment.

In *The Brantford City* (1887), 32 Fed. Rep. 324, on

an appeal in admiralty from a District Court to a Circuit Court, it was held that it was not necessary for an appellant who has given security on the release of the vessel, to give a new stipulation for the whole amount of the decree and costs. It was said of *Rubber Co.* v. *Goodyear*, 6 Wall. 153: "It was then [there] held that any security previously given, and under the control of the court ought to be taken into account in determining what additional security should be deemed 'sufficient for the costs and damages' upon appeal" (325).

In *Tucker* v. *Lee* (1829), Fed. Cas. 14,221, in an action on an appeal bond, the measure of damages was held to be, "the whole amount of the judgment recited in the bond."

To like effect, together with extensive citation of authorities:

Wood v. *Brown* (1900), 104 Fed. Rep. 203, 206 (Caldwell, Sanborn, and Thayer, JJ.).

American Surety Co. v. *North Packing &c. Co.* (1910), 178 Fed. Rep. 810.

Egan v. *Great Western Ry. Co.* (1908), 163 Fed. Rep. 344, 350.

Hardesty v. *United States* (1911), 184 Fed. Rep. 269, 273.

Pease v. *Rathbun-Jones Eng. Co.* (1916), 228 Fed. Rep. 273, 278.

Bankers Surety Co. v. *Security Trust Co.*, 39 App. D.C. 354.

"The appellate court also has the power, as a necessary incident to the exercise of its appellate

jurisdiction, to protect the parties and their interests in the subject matter of the appeal pending the appeal, and, in pursuance of this power, the court has jurisdiction, after an appeal has been perfected and a supersedeas bond given, to require the appellant to give a new supersedeas bond or in case of his default to vacate the stay, whenever it is made to appear that the original bond is clearly insufficient."

> 2 Ruling Case Law, p. 124; citing *Bock* v. *Sauk Center Grocery Co.*, 100 Minn. 71; 110 N.W. 257; 10 Ann. Cas. 802, and note; 9 L.R.A. (N.S.) 1054, and note.

"Any rule which would permit an appellant to secure the approval of a supersedeas bond in a mere nominal amount from the judge or the court commissioner or the clerk, as the case might be, and prevent this court, after sole jurisdiction of the appeal has been vested in it, from vacating the stay in default of a proper bond, leaving the respondent remediless and exposing him to a probable loss of thousands of dollars, would be a reproach upon the administration of justice" (100 Minn. 71, 74, 75).

A Court granting a supersedeas has no power to vacate it after the record has been filed in an appellate court.

> *Kendrick* v. *Roberts*, 214 Fed. Rep. 268.
> *People* v. *Judge*, 33 Mich. 111.
> *Parks* v. *Murray*, 109 N.Y. 646.
> *Blake* v. *Kimball*, 22 Vt. 632.

Hence the remedy of defendant in error is to apply to this Court for a vacation of the supersedeas.

> "The law of the United States, which gives a writ of error, provides that security shall be given; which security is a substitute for any which before existed."
>
> *Otis* v. *Warren*, 16 Mass. 53, 56.
> *Russia Cement Co.* v. *Le Page Co.*, 167 Mass. 222 (HOLMES, J.).

Hence the substitute should be ample.

> "With regard to bonds, for appeals, the appellate court has an unquestioned right to require that they shall be in form, of sufficient amounts to cover the accumulating costs, and that there shall be responsible securities to the same. And if, at any stage of a cause, a deficiency in any of these respects be discovered, it is in the power of the court to have them amended or renewed; and questions, as to the sufficiency of the bond, in respect to the amount, the solvency of the securities, or as to the occasion and time or manner of putting in another security, are purely matters of discretion."
>
> *March* v. *Griffith*, 53 N.C. 265.

(Syllabus:) Where it is shown that a supersedeas bond is entirely inadequate in amount, a sufficient bond may be required of the appellant as a condition necessary to the stay of the proceedings.

Tulleys v. *Keller*, 42 Nebr. 788.

Compare *Hathcock* v. *Société Anonyme*, 54 Fed. Rep. 522.
Kreyling v. *O'Reilly*, 95 Mo. App. 561.
See *Pulte* v. *Wayne Circuit Judge*, 47 Mich. 646.
Bank of Oxford v. *Lafayette County*, 79 Miss. 152.

In *American Brewing Co.* v. *Talbot*, 125 Mo. 388; 135 Mo. 170, appellant was twice required to give a new appeal bond: once on account of inadequacy as to form, and once on account of the sureties having become insolvent. "The stay is subject to the order of the court in which the cause is pending, in accordance with the demands of justice and the obvious spirit of the statutes authorizing a stay. The order of court which produces a stay of execution is like other orders or process of the court; namely subject to the control of the court, so that it shall not become an instrument of injustice" (135 Mo. 172).

The fact that an appeal bond was given on the appeal from the trial court to the Supreme Court of Missouri is immaterial. "No one can be a surety who is already liable for the judgment appealed from."

2 Brandt on Suretyship (3d ed.), sec. 512, and cases cited in note.
Gordon v. *Robertson*, 26 Ga. 410.
Eufaula &c. Co. v. *Plant*, 36 Ga. 623.
Stewart v. *Hall*, 106 Ga. 172, 176.
Osborne v. *Hughes*, 93 Ga. 445.

"In cases of appeal there must be a bond with security, and one already bound by the judgment

gives no additional guaranty or security to the appellee."

Benson v. *Shines*, 107 Ga. 406.
Harvely v. *Daly*, 112 Ga. 822.
Napier Bros. v. *Woodall*, 118 Ga. 830.

"The surety is bound by the existing judgment. . . . To secure the appeal, or the right to except to the judgment rendered, the law requires that some additional security shall be given to the successful party. This provision must be complied with, regardless of the solvency of those already bound" (LAMAR, J.).

Woodliff v. *Bloodworth*, 121 Ga. 456, 458.

As between sets of sureties on bonds given in successive appeals in the same case, "those on the latest bond are primarily liable because if it had not been for their interposition, the sureties on the earlier bond might not have been called on to pay."

2 Brandt, sec. 518.
Pingrey on Suretyship (2d ed.), sec. 229.
Spencer on Suretyship, secs. 152, 293.
Childs on Suretyship, pp. 251, 252, 302, 323, 381.
Stearns on Suretyship, p. 334.

Consult:

Dunlap v. *Foster*, 7 Ala. 734.
Chrisman v. *Jones*, 34 Ark. 73, 76.
Hinckley v. *Kreitz*, 58 N.Y. 583.
Church v. *Simmons*, 83 N.Y. 261, 265.
Culliford v. *Walser*, 158 N.Y. 65; 70 Am. St. 437 and note.

Opp v. *Ward*, 125 Ind. 241; 21 Am. St. 220.
McCormick's Admr. v. *Irwin*, 35 Pa. St. 111, 118 (Strong, J.).
Hartwell v. *Smith*, 15 Ohio St. 200, 205.
Moore v. *Lassiter*, 16 Lea (84 Tenn.), 630.
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Schnitzel's Appeal, 49 Pa. St. 23.
Trent v. *Rhomberg*, 66 Texas, 249, 254.
Fidelity & Deposit Co. v. *Bowen*, 123 Iowa, 356; 6 L.R.A. (N.S.) 1021 and note.
Brandenburg v. *Flynn's Admr.*, 12 B. Mon. (Ky.) 397.

To like effect, holding sureties on second bond primarily liable.

Chester v. *Broderick*, 131 N.Y. 549 (Peckham, J.).
Becker v. *People*, 164 Ill. 267.

Successive appeal bonds are cumulative. The sureties on all the bonds are bound for the obligation.

Babbitt v. *Finn*, 101 U.S. 7.

From the foregoing it is clear:

(1) The rule in *Catlett* v. *Brodie* still applies to actions at law in which a writ of error has been sued out in this Court to a State Court.

(2) The fact that security was given on the appeal from the trial court to the Supreme Court of Missouri is immaterial.

(3) As the sureties on the original bond are still liable thereon, but as their liability is now secondary,

justice to them as well as defendant in error requires that plaintiff in error give a new supersedeas bond in the sum of at least $20,000.

(4) To hold that sureties on the first bond given have a right to hold the sureties on the second bond primarily liable carries with it as a corollary the proposition that the sureties on the first bond have the right to ask that the second bond is sufficient in amount.

(5) A creditor may enforce the rights of a surety bound for the debt.

37 Cyc. 437.

EDWIN A. KRAUTHOFF,
For Defendant in Error.

To JAMES F. GREEN,
Counsel for Plaintiff in Error:

You are hereby notified that on Monday, May 17, 1920, at 12 o'clock noon, or as soon thereafter as counsel can be heard, the foregoing motion and brief in support thereof will be filed in the Supreme Court of the United States in the case in which it is entitled.

EDWIN A. KRAUTHOFF,
Attorney for Defendant in Error.

May 1, 1920.

FILED
MAY 14 1920
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
McGREW COAL COMPANY,
Defendant in Error.

No. [redacted]265

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO VACATE SUPERSEDEAS.

EDWARD J. WHITE,
JAMES F. GREEN,
Counsel for Plaintiff in Error.

St. Louis Law Printing Co., Ninth and Walnut Sts. Bell, Main 1819.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
McGREW COAL COMPANY,
Defendant in Error.
No. 765.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO VACATE SUPERSEDEAS.

Counsel for plaintiff in error received by mail, May 10, 1920, from a printing company of Boston, Massachusetts, a printed copy of the motion and brief in this cause, to which is attached a notice dated May 1, 1920, that the motion will be filed in this court May 17th, and plaintiff in error respectfully submits that under the authorities the motion should not be sustained.

Defendant in error concedes that rule 29 of this court does not apply.

In the record filed in this cause (page 31) it appears that the trial court required the appellant, The Missouri Pacific Railway Company, to file an appeal bond in the sum of $28,000.00, which was approved by the clerk, and in the record entry made by the clerk is the following recital:

> "Now at this date comes the defendant, within the time allowed by the Court, and files its appeal bond in the sum of $28,000.00, which said appeal bond was approved by the clerk of the Circuit Court of Lafayette County, Missouri, April 22, 1915."

This procedure was in compliance with Section 2042 of the Revised Statutes of Missouri, 1909, which provides that when an appeal is granted

> "The appellant, or some responsible person for him, together with two sufficient securities, to be approved by the court, shall, during the term at which the judgment appealed from was rendered, enter into a recognizance to the adverse party in a penalty double the amount of whatever debt, damages and costs, or damages and costs, have been recovered by such judgment, together with the interest that may accrue thereon, and the costs and damages that may be recovered in **any appellate court upon an appeal**, conditioned that the appellant will prosecute his appeal with due

diligence to a decision in the Appellate Court and shall perform such judgment as shall be given by such court, or such as the Appellate Court may direct the Circuit Court to give, and if the judgment of such court or any part thereof be affirmed, that he will comply with and perform the same so far as it may be affirmed, and will pay all damages and costs which may be awarded against the appellant **by any Appellate Court**; provided, however, that the court may, at the time of granting an appeal, by order of record, fix the amount of the appeal bond and allow appellant time in vacation, not exceeding ten days, to file the same, subject to the approval of the clerk, and such appeal bond, approved by the clerk and filed within the time specified in such order, shall have the effect to stay the execution thereafter, and if any execution shall have been taken prior to the filing of said bond, the same shall be released."

The Supreme Court of Missouri, in

State ex rel. v. Dillon, 98 Mo., l. c. 93,

said:

"It is not necessary that the order approving the bond and allowing the appeal should say that execution is thereby stayed. The order of the Court approving the bond and allowing the appeal operates as a *supersedeas*; nothing more is required. From the statutes just cited it will be seen that it is the duty of the Circuit Court in allowing an appeal not only to inquire as to the sufficiency and solvency of the sureties, but it

must also fix and determine the amount of the bond or recognizance. The Court passes upon the sufficiency of the sureties and amount of the bond when it approves the bond and allows the appeal. From that time on the judgment is superseded and execution stayed."

And, again, in the same case (p. 94) the Court said:

"The object in requiring the Court to determine the amount of the bond is, that when the appeal is allowed the question of *supersedeas* shall be **fixed and settled once for all.**"

And in

Zellars v. Surety Co., 210 Mo., l. c. 108,

the Supreme Court, in reviewing a number of cases, said:

"At the date this judgment was rendered and this appeal was taken, the Supreme Court was the only one to which the appeal could be taken; therefore, when the recital said that a judgment for $4,000.00 was rendered and that an appeal was taken, there was no necessity for saying that it was taken to the Supreme Court. Those words, therefore, added nothing to the bond; if there were any force in the argument that it appears on the face of the bond that the appeal was taken to the Supreme Court, the face of the bond would show that fact as well without the words 'the Supreme Court' in the recital as with them, and

the argument would be applied with equal force. Construing this bond in the light of the law as it was when it was executed, and reading the law into it we hold that it was intended to secure the payment of the judgment appealed from when that judgment should be affirmed by that Appellate Court which when the judgment of affirmance was pronounced had appellate jurisdiction of the cause."

The Supreme Court of Missouri, when it allowed the writ of error in this cause and issued the citation, as a matter of precaution probably required a bond continuing the liability of the sureties who had heretofore signed the bond on appeal from the Circuit Court, and in so doing its action was in conformity to the ruling of this Court in the case of

Babbitt v. Finn, 101 U. S., l. c. 13,

where this Court said:

"Where the bond is given in a subordinate court to prosecute an appeal to effect in a superior court, the sureties become liable if the judgment is affirmed in the superior court; **nor are they discharged in case the judgment of the superior court is removed into a higher court for re-examination and a new bond is given to prosecute the second appeal, if the judgment is affirmed in the court of last resort. Nothing will discharge the sureties given to prosecute the appeal from the court of original jurisdiction, but**

the reversal of the judgment in some court having jurisdiction to correct the alleged error (Dolby v. Jones, 2 Dev. [N. C.] L. 109; Ashby v. Sharp, 1 Litt. [Ky.] 156; Robinson v. Plimpton, 25 N. Y. 484; Smith v. Falconer, 11 Hun. [N. Y.] 481; Gardner v. Barney, 24 How. [N. Y.] Pr. 467-469; Smith v. Crouse, 24 Barb. [N. Y.] 433).

"Sureties in a bond for an appeal from the special term to the general term are fixed in their liability when the judgment rendered in the special term is affirmed at the general term, but such sureties are not liable for costs in the appeal from the general term to the Court of Appeals, as the costs of such an appeal are not within the undertaking of the sureties in a bond given to prosecute the appeal from the special term to the general term, from which it follows that the sureties in the bond to prosecute the appeal from the general term to the Court of Appeals are alone responsible for such costs, without any claim for contribution from the sureties in the bond given to prosecute the appeal from the court of original jurisdiction to the general term (Hinckley v. Kreitz, 58 N. Y. 583, 587).

"Viewed in the light of these suggestions, it is clear that the sureties in the bond given to prosecute the removal of the cause in this case from the District Court to the Circuit Court became fixed when the judgment rendered in the District Court was affirmed; nor did the removal of the judgment of affirmance rendered in the Circuit Court into the Supreme Court have any effect whatever to dismiss the liability of those sureties. Certainly not, as the judgment ren-

dered in the Circuit Court was affirmed in the Supreme Court."

And again in the same case (p. 15) the Court said:

"It is not necessary in order to charge the sureties in an appeal bond that an execution on the judgment recovered in the Appellate Court should be issued against the principal. When they execute the bond they assume the obligation that they will answer all damages and costs if the principal fails to prosecute his appeal to effect and make his plea good, from which it follows that if the judgment is affirmed by the Appellate Court, either directly or by a mandate sent down to the subordinate court, the sureties *proprio vigore* become liable to the same extent as the principal obligor. Unless the bond contains some special provisions to that effect, the sureties in such a bond given in a common-law action do not become liable for the costs incurred in consequence of a new appeal to a still higher court; or, in other words, the sureties in a bond given in the District Court to indemnify the opposite party on an appeal to the Circuit Court are not liable for the costs incurred by a subsequent removal of the cause from the Circuit Court to the Supreme Court, the rule being that in that court the plaintiff in error or appellant must give a new bond; but it is equally well settled that such new appeal will not diminish or discharge the liability of **his sureties on the bond given in the District Court**, unless the judgment

rendered in the District Court is wholly reversed."

The opinion in the Babbitt case is cited with approval by this Court in

Pease v. Rathbun-Jones Engraving Co., 243 U. S., l. c. 279.

None of the cases cited by defendant in error are opposed to the rule declared in the Babbitt case. We do not contend that an Appellate Court has not the power to require sufficient security in a proper case to protect the interest of litigants, but no such case is here presented.

In the concluding portion of the brief of defendant in error it is admitted that the sureties on the original bond are still liable thereon, but it is contended that in justice **to them** plaintiff in error should be required to give a new *supersedeas* bond, although the amount of the bond which the sureties signed is ample to secure the judgment in the case in the event it should be affirmed.

These sureties do not appear to be complaining that the Missouri Supreme Court provided additional security for them by its order in the case, and as, under the authorities cited, their liability was fixed from the date they signed the bond as a guarantee that appellant would pay all damages and costs

which might be awarded against it "**in any Appellate Court**", we respectfully submit that the motion should be overruled.

EDWARD J. WHITE,
JAMES F. GREEN,
Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.
FILED
SEP 17 1920
JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

October Term, 1920.

No. 265.

THE MISSOURI PACIFIC RAILWAY COMPANY,

PLAINTIFF IN ERROR,

v.

McGREW COAL COMPANY.

Motion by Defendant in Error to Dismiss or Affirm or Place on Summary Docket, and Brief in Support Thereof.

EDWIN A. KRAUTHOFF,
Attorney for Defendant in Error.

WILLIAM S. McCLINTOCK,
ARTHUR L. QUANT,
Of Counsel.

ADAMS C. SPENCER & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 265.

THE MISSOURI PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,
v.
McGREW COAL COMPANY.

Notice.

To the above-named Plaintiff in Error:

You are hereby notified that on Monday, October 4, 1920, at the opening of the above Court, or as soon thereafter as counsel may be heard, the annexed motion will be filed in the above-entitled case.

EDWIN A. KRAUTHOFF,
Attorney for Defendant in Error.

WILLIAM S. MCCLINTOCK,
ARTHUR L. QUANT,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 265.

THE MISSOURI PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,
v.
McGREW COAL COMPANY.

Motion by Defendant in Error to Dismiss or Affirm or Place on the Summary Docket.

Defendant in Error moves the Court to dismiss the writ of error sued out herein for want of jurisdiction in the Court to entertain the same; or, in the alternative, to affirm the judgment on the ground that it is manifest that the writ was taken for delay only, and that the questions on which the cause depend are so frivolous as not to need further argument; or, in the alternative, to transfer the case for hearing to the summary docket, on the ground that the case is of such a character as not to justify extended argument.

EDWIN A. KRAUTHOFF,
Attorney for Defendant in Error.

WILLIAM S. MCCLINTOCK,
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No. 265.

THE MISSOURI PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,
v.
McGREW COAL COMPANY.

Brief in Support of Motion.

I.

The only Federal question arising in this case was decided adversely to plaintiff in error by an unanimous opinion of this Court in *Mo. Pac. Ry. Co.* v. *McGrew Coal Co.*, 244 U.S. 191. This is demonstrated by an analysis of the several assignments of error (Rec. 110-113).

(a) Assignment of error No. 1 has regard to Rev. Stat. Mo. 1909, secs. 3173 and 3211. They were upheld as valid by the Supreme Court of Missouri in *McGrew* v. *Mo. Pac. Ry. Co.*, 230 Mo. 496 (printed in full, Rec. 46 *et seq.*). But, in the same case, a constitutional provision in Missouri, hereinafter noted, was upheld as self-enforcing, and not in violation of the Fourteenth Amendment, and a recovery upheld based on the constitutional provision (Rec. 63, 64, 69-78). That case stands affirmed. *Mo. Pac. Ry. Co.* v.

McGirr Coal Co., 244 U.S. 191. Hence the statutes cited become immaterial.

(b) Assignment of error No. 2 has regard to art. 12, sec. 12, Mo. Const. 1875, upheld as valid and self-enforcing in *McGirr* v. *Mo. Pac. Ry. Co.*, 230 Mo. 496; judgment affirmed, 244 U.S. 191.

(c) Assignment of error No. 3 is a restatement of assignments of error Nos. 1 and 2.

(d) Assignment of error No. 4 is a restatement of assignment of error No. 1.

(e) Assignment of error No. 5 is predicated of the overruling of a motion for rehearing. On a writ of error from this Court to a State Court, a Federal question cannot be injected into the case by a motion for rehearing.

Bilby v. *Stewart*, 246 U.S. 255, 257.
Godchaux Co. v. *Estopinal*, 251 U.S. 179, 181.
Mergenthaler Linotype Co. v. *Davis*, 251 U.S. 256.
Jett Bros. &c. Co. v. *Carrollton*, 252 U.S. 1, 6.
Gulf &c. R.R. Co. v. *Boone* (March 8, 1920), 64 L. Ed. 407.
Tanaevicz v. *Illinois* (March 15, 1920), 64 L. Ed. 410.
McKnight v. *Mexico*, 246 U.S. 653.
State, ex rel., v. *Sanders*, 248 U.S. 534.
Madden v. *Forbes*, 248 U.S. 535.
Penfold v. *Travis*, 248 U.S. 537.
Cincinnati Traction Co. v. *Cincinnati*, 248 U.S. 537.

Bacon v. *Saul*, 248 U.S. 537.
Richards v. *Oakley*, 248 U.S. 541.

". . . it is too late to raise a federal question for the first time in a petition for a rehearing, after the final judgment of the State court of last resort. If, however, the State court actually entertains the petition and decides the federal question, and this appears by the record, the statutory requirement that the right shall be specifically set up and denied is complied with."

5 Fed. Stat. Ann. (2d ed.) p. 780.

But, in the case at bar, the record discloses a simple overruling of the motion for rehearing without more. Accordingly, the Federal questions attempted to be raised in that motion are not before this Court.

McMillen v. *Ferrum Mining Co.*, 197 U.S. 343, 347.
Corkran &c. Co. v. *Arnaudet*, 199 U.S. 182, 193.
McCorquodale v. *Texas*, 211 U.S. 432, 437.
Waters-Peirce Oil Co. v. *Texas*, 212 U.S. 112, 118.
Forbes v. *State Council*, 216 U.S. 396, 399.
St. Louis &c. Ry. Co. v. *Shepherd*, 240 U.S. 240, 241.

(f) Assignment of error No. 6, in so far as it relates to the Federal Constitution, is covered by assignment of error No. 2. In so far as this assignment relates to the State Constitution, it does not raise a Federal question. That a State Court may have vio-

lated a State Constitution is not a Federal question.

A case involving the construction of a State Constitution does not present a Federal question.

King v. *West Virginia*, 216 U.S. 92.
Burt v. *Smith*, 203 U.S. 129, 135.
Haire v. *Rice*, 204 U.S. 291, 301.
Smith v. *Jennings*, 206 U.S. 276, 278.
5 Fed. Stat. Ann. (2d ed.) p. 742.
3 U.S. Comp. Stat. (1916) pp. 1691, 1692.

(g) Assignment of error No. 7 relates to a question of procedure in a State Court, and does not present a Federal question. It also appears that plaintiff in error in its answer filed in the State Court admitted that the petition of defendant in error was based on the constitutional provision cited in the assignment of error (Rec. 14-16).

The petition filed in the State Court set out the facts of which the recovery is predicated (Rec. 13, 14). The prayer asks judgment for the illegal freight charge, "and for said damages not exceeding $1000 and for all other and general relief according to the Statute in such cases made and provided."

The applicable statutes are Rev. Stat. Mo. 1909, secs. 3173 and 3211. The first section creates the cause of action, without fixing the penalty or prescribing the measure of damages. Sec. 3211 provides that any carrier violating sec. 3173 "shall forfeit and pay for any such offense any sum not exceeding one thousand dollars, and costs of suit, including a reasonable attorney's fee, . . ."

It is clear the pleader asked judgment for the statutory penalty and also for the illegal excess rate

charged. The right to recover the excess is not predicated of the statute, but of general principles of law (Rec. 42, 69). Defendant in error did not recover anything based on the statute.

But in Missouri it is provided by statute:

1 Rev. Stat. Mo. 1909, sec. 1727:

> "There shall be in this State but one form of action for the enforcement or protection of private rights, and redress or prevention of private wrongs, which shall be denominated a civil action; . . ."

Construed in *Ackerman* v. *Green*, 195 Mo. 124, 140; and cas. cit.

The relief granted in each case depends upon the *facts* thereof.

Clark v. *Clark*, 86 Mo. 114, 124.
Johnson-Brinkman Co. v. *Central Bank*, 116 Mo. 558, 567.
Tennent v. *Insurance Co.*, 133 Mo. App. 345, 365.

The prayer of a petition is not the subject of a demurrer.

Curry v. *Lackey*, 35 Mo. 392.
Saline County v. *Sappington*, 64 Mo. 72.
Merrill v. *Trust Co.*, 46 Mo. App. 242.

> "A decision of a State court resting on grounds of state procedure does not present a federal question."

5 Fed. Stat. Ann. (2d ed.) 747.

The construction of a plea is "purely a local question, and not assignable as error here."

Allen v. *Alleghany County*, 196 U.S. 458, 466.

L. & N. R.R. Co. v. *Holloway*, 246 U.S. 525, 528.

Questions of State practice are local, not Federal, in their nature.

Lee v. *Central of Georgia Ry. Co.*, 252 U.S. 109; 64 L. Ed. 287.

(h) Assignment of error No. 8 relates to a defense not pleaded in the Trial Court (Rec. 14-16), not passed on by the State Supreme Court (Rec. 38-42), and attempted to be raised for the first time by the motion for rehearing filed in that Court (Rec. 44). That cannot be done. In the reply brief of plaintiff in error in *Mo. Pac. Ry. Co.* v. *McGrew*, 244 U.S. 191, a similar attempt was made, and this Court declined to consider the question.

In the case last cited, the Court said:

> "The record does not disclose when plaintiff in error was incorporated, or what provisions its charter contains. There is no suggestion of anything therein amounting to a contract exempting it from legislation commonly within the police power" (244 U.S. 199).

The record in the case at bar is in like condition.

> "The general rule is that private statutes of a state, as distinguished from public statutes are

not judicially noticed either by its own courts, or by any other courts, in the absence of constitutional or statutory requirement to the contrary . . . The rule applies of course in the absence of a statute to the contrary to private acts creating or relating to private corporations."

16 Cyc. 896, 897.

". . . private laws . . . are matters of fact, to be proved as such in the ordinary manner."

Leland v. *Wilkinson*, 6 Pet. 317, 322.

"The statute creating the corporation is a private one and must be given in evidence. The act making the printed statute book evidence of private statutes does not dispense with the requirement of the common law that they must be produced in evidence."

Bailey v. *Trustees*, 12 Mo. 174, 177.
Inhabitants v. *Robinson*, 75 Mo. 192, 194.
Kirby v. *Wabash Ry. Co.*, 75 Mo. App. 345, 348.

The charter granted to Pacific Railway Company in 1849 does not exempt The Missouri Pacific Railway Company from the exercise of the police power of Missouri.

Georgia Railroad & Banking Co. v. *Smith*, 128 U.S. 174.
Minneapolis &c. Ry. Co. v. *Emmons*, 149 U.S. 364, 367, 368.
Chicago &c. R.R. Co. v. *Tranbarger*, 238 U.S. 67, 74, *et seq.*

> "A special or private act is a statute operating only on particular persons and private concerns."
>
> 36 Cyc. 986.

There is nothing in the act in question (Laws of Missouri, 1849, p. 219 *et seq.*) making it an act of a public nature—indeed it is classified in the statute book under "acts of a private nature" (Laws of Missouri, 1849, p. 133).

Section 12 of the Act (p. 211) required the road to be constructed in ten years. Was it so constructed? As an historical fact, it was not.

But the Act of incorporation of Pacific Railroad Company in the year 1849 does not disable the people of Missouri from an exercise of a phase of the police power, the prevention of discrimination by railroad companies.

In *Pullman's Palace Car Co.* v. *Mo. Pac. Ry. Co.*, 115 U.S. 587, it is stated the railway company was formed in 1880 through the process of consolidation. Prior thereto, in 1877, Missouri Pacific Railway Company was a corporation. Of the 1880 corporation this Court said:

> "The present Missouri Pacific Company is a different corporation from that which contracted with the Pullman Company. The original company owned and operated a railroad between St. Louis and Kansas City. This company owns and operates that road and others besides. *It is a new corporation created by the dissolution of several old ones*, and the establishment of this in their place. It has new powers, *new franchises*, and new stockholders" (115 U.S. 594).

"It has been frequently decided by this court that a special statutory exemption or privilege, such as immunity from taxation *or a right to fix and determine rates of fare*, does not accompany the property in its transfer to a purchaser, in the absence of express direction to that effect in the statute."

St. Louis &c. Ry. Co. v. *Gill*, 156 U.S. 649, 656.

Rochester Ry. Co. v. *Rochester*, 205 U.S. 236, 247.

Norfolk &c. R.R. Co. v. *Pendleton*, 156 U.S. 667.

Milwaukee Elec. Ry. Co. v. *Wisconsin R.R. Commn.*, 238 U.S. 174.

In *Sloan* v. *Pacific R.R. Co.*, 61 Mo. 24 (the bulwark of plaintiff in error in this case), it was pointed out that the charter granted in 1849 was changed in 1868, and that, ten years thereafter (1878), Pacific Railroad Company "shall be subject to the provisions of the general laws of the State, now in force or hereafter to be enacted, classifying freights and fixing the regulation rates and charges for the transportation of freights and passengers by the railroad in this State . . ." (61 Mo. 30).

(i) Assignment of error No. 9 relates to a defense not pleaded in the Trial Court (Rec. 14-16), not considered by the State Supreme Court (Rec. 38-42), and attempted to be raised for the first time by a motion for rehearing in the State Court (Rec. 44, 45). In ad-

dition, whether a common carrier in Missouri is governed by a self-enforcing constitutional provision or a State statute claimed to conflict with it is not a Federal question.

(j) Assignment of error No. 10 is a restatement of assignment of error No. 8.

(k) Assignment of error No. 11 is in part a restatement of assignment of error No. 2. Whether on a given state of facts a party has suffered damage is not a Federal question. As a question of general law, the recovery of defendant in error is predicated of the charge of an illegal freight rate, paid by a consignee, and reimbursement made by consignor (Rec. 38-42). The State Court followed *Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (since followed in the Spiller cases, 40 Sup. Ct. 466, 472); also other authorities cited in its opinion.

The liability of a carrier to refund a sum charged in excess of a legal rate is clearly established.

> *State, ex rel.*, v. *Chicago & Alton R.R. Co.*, 265 Mo. 646, 680.
>
> *Fletcher Paper Co.* v. *Railway Co.*, 198 Mich. 469, 491; affirmed, 248 U.S. 30.

A carrier "has no authority, right, or privilege to charge for any service more than the amount definitely fixed by law; every overcharge is an unlawful exaction of money from its patrons who are overcharged; the road is in duty bound to refund the overcharge; . . ."

> *Florida East Coast Ry. Co.* v. *State*, 82 Southern, 136, 139.

"And when appellant [carrier] exacted of appellee [shipper] more than it could legally charge [under a long- and short-haul clause], his right to recover the excess so paid is precisely similar to the right to recover for any other illegal exaction. He whose money is taken from him illegally is to that extent damaged. It is not necessary for appellee [shipper] to show anything more than that he was compelled to pay more than appellant [carrier] had a right to charge."

Louisville &c. R.R. Co. v. *Walker*, 110 Ky. 961, 965.

See also—

Big Diamond Milling Co. v. *Chicago &c. Ry. Co.* (Minn.), 171 N.W. 799.

"When a charge has been paid to a carrier or a demand exacted in violation of the long and short haul of the Constitution . . . the transaction fixes conclusively the liability of the carrier [and] . . . itself furnishes the measure of damage which the shipper suffered as soon as it occurred."

California Adjustment Co. v. *Railway Co.* (Calif.), 175 Pac. 682, 684, citing—

Southern Pac. Co. v. *California Adjustment Co.*, 237 Fed. 954, 959, 960; certiorari granted, 243 U.S. 650; dismissed by petitioner on January 13, 1919 (248 U.S. 595), after the decision of the Supreme Court of California, *supra*.

"The overcharge was illegal and necessarily must be restored."

McAdams v. *Express Co.*, 139 La. 682, 686.
Louisville &c. R. Co. v. *Wilson*, 132 Ind. 517; 18 L.R.A. 105.
Cook v. *Railway Co.*, 81 Iowa, 551; 25 Am. St. Rep. 512; 9 L.R.A. 764.

An excessive charge paid to a carrier by a consignee to whom goods have been sold at a price delivered f.o.b. at destination, and for which the consignor has reimbursed the consignee, is recoverable by the consignor.

In case of an excessive freight rate, ". . . the legal injury is suffered by the person who pays for the carriage. This does not mean the man who actually hands the money or the check to the carrier. Frequently a manufacturer will sell his goods delivered at a particular point, but allow the consignee to pay the freight thereto, deducting the amount thereof from the purchase price of the goods. In such a case the manufacturer has paid the freight rate and is entitled to recover the overcharge."

Watkins on Shippers & Carriers, p. 344, sec. 213.

In *Jennison Bros. & Co.* v. *C. & N.W. Ry. Co.*, 158 N.W. 398; 133 Minn. 268, plaintiff sold one Dixon flour at an agreed price to be delivered f.o.b. the city in which Dixon lived. Dixon paid the freight and deducted the amount thereof from the purchase price of the flour. Dixon discovered the railroad company had charged an excessive rate. Dixon compelled the

railroad company to pay this excess to him. Held: "As between the seller and purchaser of commodities transported to destination by a common carrier, overcharges for such transportation belong to the one who had borne the expense of such transportation. . . . Plaintiff [the shipper] had borne the expense of the transportation in question and is entitled to the amount refunded by the railway company."

(Syllabus) A sells to B an article and contracts with a carrier to transport it at a given rate of freight. It is agreed between A and B that B shall pay the freight bills and deduct from the purchase price the amount so paid. The carrier delivers the article to B and collects from him a higher rate than that agreed upon; B credits on the purchase price the amounts so paid. . . . Held, that A is entitled to recover of the carrier the difference between the rate agreed on and the rate actually collected.

Georgia R.R. & Banking Co. v. *Crossley*, 128 Ga. 35.

In *Service & Wright Lumber Co.* v. *Sumpter Valley Ry. Co.*, 67 Ore. 63, 76, a connecting carrier paid to the defendant carrier excessive freight charges on lumber shipped by the plaintiff. The connecting carrier collected the money so paid from the consignees. The consignees deducted the money so collected from moneys due the plaintiff. Held: plaintiff was entitled to recover.

> "Our view of the question is that the party who pays the freight *or who is liable for its payment*, whether he be the millowner, manufacturer, shipper, or consignee, is the one injured by an exces-

sive freight charge and in him alone is vested the right to recover because of the illegal exaction."

Davis v. *Mobile & O. R. Co.*, 194 Fed. 374, 376.

In *A., T. & S.F. R.R. Co.* v. *Goetz & Brada Mfg. Co.*, 51 Ill. App. 151, plaintiffs shipped, over the line of defendant, certain goods from Chicago to a point in California under an agreed rate. The goods were sold f.o.b. the California point, freight to be paid by the shipper. The consignee paid the freight, charged it to the consignor, and the consignor paid the freight to the consignee. Held: the consignor could recover of the carrier.

In *Lake Erie &c. Railroad Co.* v. *Condon*, 10 Ind. App. 536, a railroad company exacted an overcharge from a consignee, who deducted the overcharge from the price of the goods due the consignor. The consignor was allowed to recover for the overcharge.

In *Andalman* v. *Railway Co.*, 153 Ill. App. 169, Fisher consigned a carload of rags to his own order and then sold the rags to Andalman, by endorsing the bill of lading for the car. Andalman paid an excessive freight rate, but received credit, in paying for the rags, for the freight paid. Held: Andalman had no cause of action. ". . . plaintiff did not pay the freight on said rags. He only advanced the amount stated in the freight bill for Fisher, the amount so advanced was deducted from the purchase price of the rags in his settlement with Fisher, and plaintiff has no right of action against defendant for the money so advanced by him for Fisher" (153 Ill. App. 171, 172).

In *Central Trust Co.* v. *Railway*, 156 Iowa, 104, 125, goods were sold f.o.b. destination. The carrier charged an illegal rate. The consignee paid the freight. In some instances, the consignee was reimbursed by the consignor; in some instances not. As to the freight for which the consignor had reimbursed the consignee, it was held the consignor was the person injured and entitled to recover.

> "If the consignee of the goods has shown that he has suffered damage by reason of the discrimination, he is entitled to recover; otherwise not. Doubtless the presumption is that a consignee who pays the freight is the party injured; but, if the freight is finally collected from the consignor, then the presumption immediately shifts, and he is prima facie the party injured. Here the Packing Company [the consignee] paid the freight in the first instance; but it charged the amount thereof to the consignor's account and deducted the same from the purchase price of the hogs. If there was any discrimination, the party presumptively injured was the shipper, who actually paid the freight" (156 Iowa, 130, 131).

The same rule is applied by the Interstate Commerce Commission:

> "Each of the shipments included in the claim was sold by complainant f.o.b., point of destination—that is to say, complainant quoted to its customer a price on each carload of lumber which included the freight charges to destination. Upon receipt of the lumber, the purchaser remitted to

complainant the amount of the invoice, minus the freight charges, and such amount was accepted by complainant in settlement of the account. It is therefore clear that complainant actually paid the freight charges upon the shipments which are included in its claim."

E. Sondheimer Co. v. *R.R. Co.*, 20 I.C.C. 606, 607.

"The freight charges were tendered and paid to the delivering carrier by consignees, but the paid expense bills were transmitted to consignors in lieu of the amount of cash and deducted from the invoice price in settlement. Consignors are 'the real and substantial parties in interest.' The freight charges were paid on their account and they bore the excess transportation charge."

Commercial Club v. *Railway Co.*, 27 I.C.C. 302, 322, 323.

"These complainants were shippers of hardwood lumber to this destination and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was in fact exacted. They were therefore deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate they were compelled to pay."

Burgess v. *Freight Bureau*, 13 I.C.C. 668, 680.

An aftermath of the *Burgess Case* is—

Darnell-Taenzer Lumber Co. v. *Southern Pac. Co.*, 221 Fed. 890.

We quote from that case: "The evidence, however, upon the trial below, affirmatively tended to show actual and substantial damage to the shipper by reason of the excessive freight rate. The testimony of the only witness sworn on this subject was to the effect . . . that the majority of shipments were made f. o. b., coast points, the shipper, therefore, in fact paying the freight, notwithstanding in commercial practice the consignee paid the freight bill on delivery of the lumber, remitting to the shipper the balance of the bill" (221 Fed. 894).

On a subsequent trial, the shipper recovered judgment; affirmed in the Circuit Court of Appeals (229 Fed. 1022) and in the Supreme Court of the United States (245 U.S. 531). "The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that was in relation with him, and from whom the carrier took the sum" (245 U.S. 534).

In *Moore* v. *Ray & Gila Valley R.R.*, P.U.R. 1916B, 637, 640, reference is made to a former case decided by the Corporation Commission of Arizona, not officially reported, known as the Pacific Creamery case. In that case "it was shown that the Pacific Creamery sold its products delivered, the merchant deducting the amount of the freight charges and the Creamery giving him credit on the invoice for the amount of such charges. The Pacific Creamery, therefore, was the

party who actually paid the freight and was equitably entitled to any refund that should be granted."

With regard to the decisions of the Interstate Commerce Commission it will be remembered: "The power given [to it by Congress] is partly judicial, partly executive and administrative, but not legislative" (167 U.S. 504).

To inquire "whether the rates which have been charged and collected are reasonable—that is a judicial act" (167 U.S. 499).

An order of reparation is made by the Interstate Commerce Commission in its quasi-judicial capacity to measure past injuries to a private shipper (Syllabus 2).

Baer Bros. Merc. Co. v. *Railroad Co.*, 233 U.S. 479, 486.

Other cases in which the Interstate Commerce Commission applied the principle that, in case of excessive freight rates charged, the refund is due the one who ultimately paid the freight as an item of freight, are:

Sunnyside Coal M. Co. v. *Denver & Rio Grande R.R. Co.*, 19 I.C.C. 20, 21.

Mountain Ice Co. v. *Delaware &c. R.R. Co.*, 21 I.C.C. 45, 51.

Hygienic Ice Co. v. *C. & N.W. Ry. Co.*, 37 I.C.C. 384, 388.

Oden v. *Seaboard Air Line Ry. Co.*, 37 I.C.C. 345, 347, *et seq.*

Lindsay Bros. v. *Grand Rapids &c. Ry. Co.*, 15 I.C.C. 182; explained 37 I.C.C. 349.

Prusia Hdw. Co. v. *Railway Co.*, 40 I.C.C. 747, 748.

Sanford-Day Iron Works v. *Railroad Co.*, 41 I.C.C. 10, 12.

Charles Boldt Co. v. *Railroad Co.*, 42 I.C.C. 175, 176 (directly in point).

Gamble-Robinson Fruit Co. v. *Southern Pac. Co.*, 45 I.C.C. 578, 579.

Herrick Ref. &c. Co. v. *Railroad Co.*, 46 I.C.C. 421, 422.

Memphis Freight Bureau v. *Railroad Co.*, 50 I.C.C. 345, 348.

Midland Coal Co. v. *Railroad Co.*, 51 I.C.C. 313, 314, *et seq.*

Advance Bag Co. v. *Railway Co.*, 51 I.C.C. 467, 468.

Sunderland Bros. Co. v. *Railroad Co.*, 51 I.C.C. 185, 186.

Hinrichs v. *Wells Fargo & Co.*, 53 I.C.C. 362, 364.

Crutchfield & Woolfolk v. *Southern Pac. Co.*, 24 I.C.C. 679.

Lindas Lumber Co. v. *Railway Co.*, 53 I.C.C. 179, 181.

South Texas Lumber Co. v. *Railroad &c. Co.*, 53 I.C.C. 737, 739.

"The ice was sold for a delivered price, and by the terms of the contract of sale the freight money was to be paid by the ice company [the shipper]. Under arrangement between that company and the consignee the latter, in fact, paid the money to the carrier and was reimbursed by

the ice company [the shipper]; that is, the consignee was the agent of the ice company [the shipper] in the making of this payment, and the payment, upon every rule of law, was a payment by the principal" (21 I.C.C. 51).

". . . the consignors are entitled to reparation on shipments sold f.o.b. destination" (40 I.C.C. 741).

Consignees are not entitled to reparation on goods sold f.o.b. destination where charges are borne by consignor (47 I.C.C. 223; 49 I.C.C. 34).

In *A. J. Higgins Lumber & Export Co.* v. *Railroad Co.*, 51 I.C.C. 214, cars were shipped under a reconsignment privilege. At ultimate destination, illegal demurrage charges claimed to have accrued *en route* were collected of consignee and repaid to him by consignor. Reparation awarded to consignor.

But the Courts and the Commission have refused to go beyond the point of who actually paid the freight as such, that is, the consignor or consignee, or some one who as to them as agent was the principal in the transaction, with a view to determining whether, in some form or other, the burden of the excessive freight rate was shifted, as, for instance, the act of the consignee in increasing the price to the customer by taking the excessive rate into consideration, or whether, in the case of a rate illegal by operation of law, the general profits of a business were injuriously affected.

In 3 Gartner's Notes to Interstate Commerce Com-

mission Reports, p. 199, reference is made to *Bascom-Porter Co.* v. *A., T. & S.F. Ry. Co.*, unreported:

> "The shipper who has been charged an unreasonable rate and who owns the goods transported is entitled to repayment. This Commission will not undertake the impossible task of ascertaining the shipper's ultimate profit from his business."

The right of a shipper who pays an excessive freight rate to recover reparation is not affected by the fact that the unreasonable excess has been wholly or in part shifted to the purchaser by the terms of the contract of sale.

> "If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to give them."
>
> *Burgess* v. *Transcontinental Freight Bureau*, 13 I.C.C. 668, 680 (see 245 U.S. 534).

The reparation awarded in the *Burgess Case* was enforced by civil action.

> *Darnell-Taenzer Lumber Co.* v. *Southern Pac. Co.*, 221 Fed. 890; s.c., 229 Fed. 1022; affirmed, *sub nom. Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531; 62 L. Ed. 451.

(Syllabus, 62 L. Ed. 451.) The right of shippers to recover the reparation awarded them by the Inter-

state Commerce Commission on account of the exaction of an excessive freight rate is not defeated, because the shippers were able to pass on to the purchasers the damage that they sustained in the first instance by paying the unreasonable charge.

(In that case, the lumber was sold f.o.b. destination, consignee paid the freight in the first instance, reimbursed by consignor [221 Fed. 894], to whom reparation was awarded.)

In *Nicola* v. *Railroad Co.*, 14 I.C.C. 199, 207, 208, the Commission declined to go away "from the direct results the act of the carrier in the establishment and exaction of an unjust rate into the domain of direct and remote consequences."

In that case, it was "contended by the carriers that both the manufacturer or mill man and the broker or dealer to whom he ordinarily sells the lumber protect themselves against the injury caused by the excessive amount of the rate by adding it to the price of the lumber, thus imposing the burden or injury upon the consumer, and that if any one of the parties is entitled to the refund it is the latter" (14 I.C.C. 207). Held (209): "The reparation is due to the person who has been required to pay the excessive charge as the price of transportation."

> "The shipper who has been charged an unlawful rate and who is the owner of goods transported is entitled to repayment without the imposition of the impossible task upon the Commission of ascertaining the ultimate profits accruing from the business of the shipper. Moreover, the owner of the freight who has been required

to pay an unreasonable rate is entitled, upon proper complaint and showing, to reparation irrespective of the profits accruing from his business."

Kindelon v. *Southern Pac. Co.*, 17 I.C.C. 251, 255.

"These complainants usually sell their lumber f. o. b. the point of destination, but in so doing they endeavor to realize approximately the same price at the mill, whatever the point of delivery. If a quotation is asked for New York City, the lumberman adds to his mill price the cost of transportation to New York; if the intended sale is upon the Pacific coast, then to this same mill price is added the Pacific coast rate. . . . The defendants urge that, inasmuch as the complainants increased the price of their lumber by the amount of the increase in the transportation charge, they have suffered no damage.

"With respect to the practical aspect of this claim it may be said:

"There was no fixed mill price for this lumber, nor does the manufacturer always obtain the price which he quotes. While, therefore, these complainants may have attempted to increase their price upon the Pacific coast by the amount of the advance in the freight rate, it is by no means certain that they obtained in all cases, nor in any case, the full price at the mill which they otherwise would. While it may be that some portion of this advance was in most instances added to the price obtained for the lumber, it is probable that

the full amount of the advance was seldom recouped. It must be evident that where there is no established price at the mill it would be impossible to determine the amount of damage to which the complainants would be entitled upon this basis.

"The profit which a lumber manufacturer makes depends not only upon his profit per 1,000 feet, but also upon the number of thousand feet which he sells. The hardwood lumber which is consumed upon the Pacific coast is brought in from foreign countries as well as from the east. An advance of $4 per 1,000 feet would certainly tend to limit the sales of the eastern producer as compared with his foreign competitor. Assuming, therefore, that an advance equal to the increase in the freight rate was charged, the number of sales might have declined so that the total profit to the shipper was very much less than it otherwise would have been. Evidently the complainants' damages could not be assessed upon any such speculative basis. With respect to this same claim the commission said in the *Burgess case, supra*, at 680:

"'. . . These complainants were shippers of hardwood lumber to this destination, and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was in fact exacted. They were thereby deprived of a legal right, and the measure of their damages is the difference between the rate to which they were entitled and the rate which they were compelled to pay. If complain-

ants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. . . .' This is exactly our holding here."

Michigan Hardwood Mfrs. Assn. v. *Freight Bureau*, 27 I.C.C. 32, 38, 39.

It was also held in that case, the lumber being sold f.o.b. the point of delivery, freight paid by consignees, upon proof the consignor reimbursed the consignees, reparation would be awarded the consignor (27 I.C.C. 40).

See also 27 I.C.C. 324:

". . . the actual practice was to sell lumber under keenly competitive conditions at what could be obtained for it."

"Carriers can not be heard to say that reparation for the exaction of unreasonable freight rates should be denied because the shipper or consignee from whom the same has been collected has on that account secured a higher price for the commodity from his purchaser."

Ballou v. *Railroad Co.*, 34 I.C.C. 120, 121; enforced by civil action, 242 Fed. 862, 865, citing the rulings of the Commission in the Burgess, Nicola, Kindelon, and Ballou cases, *supra*.

The *Ballou Case* is approvingly cited, 245 U.S. 534. The *Burgess Case* and the *Ballou Case* followed:

Pilcher Hardware Co. v. *Railway Co.*, 37 I.C.C. 542.

The *Ballou Case* followed:

Birdsboro Stone Co. v. *Railroad Co.*, 37 I.C.C. 577, 578.

See also—

Sanford-Day Iron Works v. *Railroad*, 41 I.C.C. 10, 12.

Prasia Hdw. Co. v. *Railway Co.*, 40 I.C.C. 747, 748.

Sloss-Sheffield Steel & Iron Co. v. *Railroad Co.*, 51 I.C.C. 635, 641, *et seq.* (full discussion).

An ultimate consumer who claimed the consignee had included the excessive freight rate in the price charged for the article shipped was denied a recovery.

State v. *Central Vermont R.R. Co.*, 81 Vt. 459 (see note 21 L.R.A. N.S. 949); cited 245 U.S. 534.

One guilty of a wrong may never defend on the ground the person wronged has been compensated from other sources.

Matthews v. *St. Louis &c. Ry. Co.*, 121 Mo. 298, 336.

Matthews v. *Mo. Pac. Ry. Co.*, 142 Mo. 645, 659.

Southern Pac. Co. v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 534.

"There can be no abatement of damages on the ground of partial compensation when it comes from a collateral source independent of defendant."

Williams v. *St. Louis &c. Ry. Co.*, 123 Mo. 573, 585.

Hartford Fire Ins. Co. v. *Wabash Ry. Co.*, 74 Mo. App. 106, 113.

1 Sutherland on Damages (4th ed.), sec. 158 and cas. cit.

Chicago &c. R.R. Co. v. *Pullman Car Co.*, 139 U.S. 79, 86, *et seq.*

The Propeller Monticello v. *Mollison*, 17 How. 152.

Regan v. *Railroad Co.*, 60 Conn. 124; 25 Am. St. 306.

Perrott v. *Shearer*, 17 Mich. 48, 55.

In *Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, plaintiff paid freight in excess of the legal rate. "The carrier ought not to be allowed to retain his unlawful profit." The case cited in 230 U.S. *supra*, was held "not like the present . . . here the plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss" (245 U.S. 534, 535).

"Cases of excessive and unreasonable rates differ from discriminating charges in the fact that in the latter case there is nothing unlawful in the charging and receiving of the higher or published rate on which the demand for reparation is based; the unlawfulness is in giving a lower rate to some-

one else. On the other hand, the charging of an excessive and unreasonable rate is *ipso facto* unlawful."

Darnell-Taenzer Lumber Co. v. *Southern Pac. Co.*, 221 Fed. 890, 894.

Missouri Southern R. Co. v. *Public Service Commission* (Mo. Sup.), 214 S.W. 379, 381.

McGrew v. *Railroad Co.*, 230 Mo. 496, 547.

Rec. 36.

In the case of *Mo. Pac. Ry. Co.* v. *McGrew Coal Co.*, 244 U.S. 191, the plaintiff in error also cited *Pennsylvania R.R. Co.* v. *International Coal Min. Co.*, 230 U.S. 184, as well as the other cases relied on in the motion for rehearing (Rec. 43) in the case at bar. None of them were noticed by the Court.

"An unreasonable rate was in fact exacted. They [the shippers] were thereby deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay."

Burgess Case, 13 I.C.C. 668, 680.

Kindelon v. *Southern Pac. Co.* 17 I.C.C. 251, 255.

The rule quoted was applied in the *Meeker Case* (23 I.C.C. 480), and upheld in *Meeker & Co.* v. *Lehigh Valley R.R. Co.*, 236 U.S. 412, 429.

See also—

Mills v. *Lehigh Valley R.R. Co.*, 238 U.S. 473.

New York &c. R. Co. v. *Ballou*, 242 Fed. 862; cited approvingly, 245 U.S. 534.

Sharpless v. *Lawrence*, 213 Fed. 423, is an unfair-competition case.

Lehigh Valley R. Co. v. *American Hay Co.*, 219 Fed. 539, does not deal with an unlawful rate. In addition that case is based largely on the *Meeker Case*, 211 Fed. 785; reversed, 236 U.S. 434.

The *Kirkpatrick Case*, 86 Mo. 341, is an action by a consignee (who had become the owner of the goods) to recover damages for their destruction in transit. In such instance, either consignor or consignee may sue.

The *Hoover Case*, 156 Pa. St. 220, interprets a statute limiting the right of recovery to "the amount of injury suffered" (156 Pa. St. 227). Then, too, that is a rebate case, not the case of charging an unlawful rate.

Homestead Co. v. *Des Moines Electric Co.*, 226 Fed. 49, is a discrimination case; not the charging of an illegal rate.

In the instant case, "clearly the measure of damages for doing the unlawful thing . . . is the amount of excess charged for the shorter distance over that charged for the longer distance" (230 Mo. 547).

The *Homestead Case* was decided August 30, 1915. The *Darnell-Taenzer Case* was decided January 21, 1918 (245 U.S. 531).

The *Homestead Case* was appealed (248 Fed. 439). There is a strong dissent by Judge STONE (248 Fed. 446). The opinion was filed January 7, 1918.

Plaintiff in error cites (Rec. 43) *Railroad Co.* v. *Spiller*, 246 Fed. 1, decided October 26, 1917. On motion for rehearing, it was said in that case (249 Fed. 677):

> "Since the opinion of this Court in the above case was filed, the Supreme Court has decided in Southern Pacific Company et al. v. Darnell-Taenzer Lumber Company et al., 245 U.S. 531, 38 Sup. Ct. 186, 62 L. Ed. 451 (January 21, 1918), that where a shipper has paid a rate afterwards declared to be excessive by the Interstate Commerce Commission, he may recover as damages the difference between the excessive rate and the rate declared to be just and reasonable by the Commission, without proof of actual injury. It results that anything said in the opinion of this court contrary to the above decision is overruled."

It is evident the *Homestead Case* (248 Fed. 439) and the *Spiller Case* (246 Fed. 1) are both decided from the same viewpoint. That Court has modified the *Spiller Case* (249 Fed. 677).

The *Spiller Cases* (40 Sup. Ct. 466) reverse the Circuit Court of Appeals (246 Fed. 1).

II.

Under section 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. L. 726), this Court does not have jurisdiction of the pending writ of error sued out February 10, 1920 (Rec. 3, 4).

The Missouri Constitution (art. 12, sec. 12), which provides: "It shall not be lawful in this State for any railway company to charge for freight or passengers a greater amount for the transportation of the same, for a less distance than the amount charged for a greater distance; . . ." does not of itself violate the Fourteenth Amendment to the Constitution of the United States.

In *Mo. Pac. Ry. Co.* v. *McGrew Coal Co.*, 244 U.S. 191, 199, 200 (on all fours with the case at bar), this Court said:

> "No claim is made that the cost of moving freight over its lines in Missouri is without substantial relation to distance; and no facts are alleged which indicate material differences between conditions and circumstances under which the hauls from mines at Myrick were made and those surrounding the longer shipments for less charges over other portions of the road.
>
> "And we think it must be accepted as settled that unless some controlling circumstance of a character not here disclosed is established . . . there is nothing in the Federal Constitution or laws presently relied on which necessarily restricts the power of a State by general rule to prohibit railway companies from receiving higher charges for shorter hauls than for longer ones when both are wholly within its borders.
>
> "Such a prohibition is not necessarily an arbitrary, unreasonable or grossly oppressive measure for preventing discrimination and insuring equal and just treatment to all shippers."

It is clear, then, that the State statutes and Constitution, mentioned by plaintiff in error, are not void on their face, as in violation of the Fourteenth Amendment. That amendment, as applied to the pending case, grants plaintiff in error an immunity, that of not being deprived of its property without due process of law.

Whether a State statute regulating rates violates the Fourteenth Amendment is a question of fact in each particular case.

> *Chicago &c. Ry. Co.* v. *Wellman*, 143 U.S. 339.
> *Missouri Rate Cases*, 230 U.S. 474, 508.

> "The acts are valid upon their face as a proper exercise of governmental authority in the establishment of reasonable rates, and each complainant in order to succeed in assailing them must show that as to it the rates are confiscatory" (230 U.S. 508).

A Court may find an ordinance to be unreasonable on its face, or "by a state of facts which affects its operation . . ."

> *Stegmann* v. *Weeke* (Mo.), 214 S.W. 137, 140.

> "In order to give this court jurisdiction by writ of error under amended §237, Judicial Code, it is the validity of the statute or authority which must be drawn in question. The mere objection to an exercise of authority under a statute, whose

validity is not attacked, cannot be made the basis of a writ of error from this court."

Jett Bros. &c. Co. v. *Carrollton*, 252 U.S. 1, 6.

"The distinction between assailing the validity of a treaty or of a statute and relying upon a special construction of either is patent and has been the subject of such full discussion by this court that it should not now be considered either doubtful or obscure."

Erie R.R. Co. v. *Hamilton*, 248 U.S. 369, 372.

The validity, not the construction, of a statute must be directly drawn in question.

South Carolina v. *Seymour*, 153 U.S. 353, 358.
Taylor v. *Taft*, 203 U.S. 461, 464.

"The validity of a statute is not drawn in question every time rights claimed under such statute are controverted . . ."

United States v. *Lynch*, 137 U.S. 280, 285.
Taylor v. *Taft*, 203 U.S. 461, 464.

"A dispute of the facts upon which the authority was exercised is not a dispute of its validity."

Ireland v. *Woods*, 246 U.S. 323, 328.
Champion Lumber Co. v. *Fisher*, 227 U.S. 445, 452.

In the following cases, writs of error to State Courts have been dismissed for want of jurisdiction in this Court, under section 237, Judicial Code, as amended September 6, 1916.

Philadelphia &c. Co. v. *Gilbert*, 245 U.S. 162.
Stadelman v. *Miner*, 246 U.S. 544.
Northern Pac. Ry. Co. v. *Solum*, 247 U.S. 477, 481 (suit to recover excessive freight charges).
Coon v. *Kennedy*, 248 U.S. 457.
Chicago &c. R.R. Co. v. *Basham*, 249 U.S. 164.
Citizens Bank v. *Opperman*, 249 U.S. 448.
Dana v. *Dana*, 250 U.S. 220.

In the following case a writ of error to a State Court was entertained, the statute or authority of the State being invalid on its face and in its entirety.

New Orleans &c. R.R. Co. v. *Scarlet*, 249 U.S. 528.

Where order valid in its entirety, jurisdiction exercised.

Corn Products Refg. Co. v. *Eddy*, 249 U.S. 427.
C. & N.W. Ry. Co. v. *Ochs*, 249 U.S. 416.
Lake Erie &c. Co. v. *Public Utilities Commission*, 249 U.S. 422.

But in the case at bar, the Missouri constitutional provision complained of is not void on its face. It is void, if at all, only by reason of extraneous facts not

disclosed in the evidence, and which, if disclosed, would not present a case within the jurisdiction of this Court under the second clause of section 237 of the Judicial Code, as amended September 6, 1916, on writ of error, but only under the third clause, on writ of certiorari.

And a writ of error cannot be converted into an application for a writ of certiorari after the time limit for applying for the latter has expired.

Hogarty v. *Philadelphia &c. Ry. Co.*, 250 U.S. 650.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

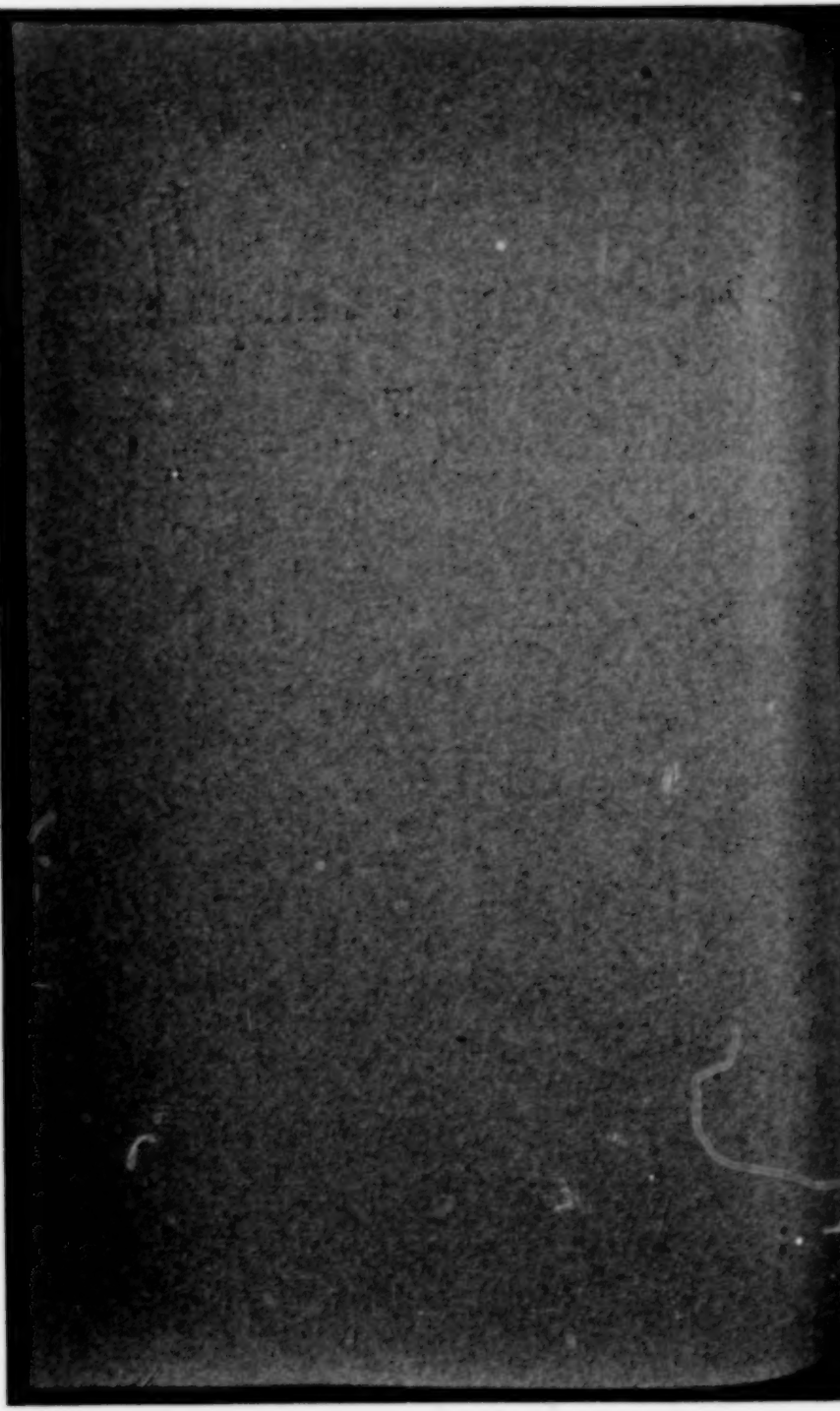
THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
McGREW COAL COMPANY,
Defendant in Error.

No. 288.

In Error to the Supreme Court of the State of Missouri.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

HARVEY C. CLARK,
EDWARD J. WHITE,
JAMES E. MORRIS,
Counsel for Plaintiff in Error.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error, vs. McGREW COAL COMPANY, Defendant in Error.	No. 265.

In Error to the Supreme Court of the State of Missouri.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Defendant in error has filed motion requesting the Court to dismiss the writ of error herein for want of jurisdiction, or in the alternative to affirm the judgment on the ground that it is manifest that the writ was taken for delay, or in the alternative transfer the case for hearing to the summary docket, and has filed its brief in support of said motion, contending

that a federal question which it is conceded is in the case was decided adversely to plaintiff in error in Missouri Pacific Railway Company v. McGrew Coal Company, 244 U. S. 191.

Defendant in error also insists that some of the assignments of error appearing in the record raise federal questions for the first time in the motion for rehearing filed in the State Supreme Court. We do not contend that this Court may consider federal questions asserted for the first time in a motion for rehearing filed in the State court, and no such situation is presented in the record here. It is true that some constitutional questions are reiterated in the motion for rehearing filed in the Missouri Supreme Court, but such procedure was a proper one, as the same or similar questions had been in the case from the beginning. In the case between the same parties, **230 Mo. 496** (Rec., p. 47), Hall, Special Judge, speaking for the Court, said:

> "Where plaintiff's cause of action is founded upon a statute **the constitutionality and life of the statute are involved from the start to the finish because, unless the statute has legal force and effect plaintiff has no cause of action** and defendant at any time and in any court until the final end of the case, has the right to object that plaintiff's petition does not state facts sufficient to constitute a cause of action for the reason that the statute upon which it is founded is unconsti-

tutional, or has been repealed. Defendant has the right to object for the first time in the appellate court that the petition does not state a cause of action and it matters not what the ground of objection may be, provided only that it be good and sufficient in law (R. S. 1899, Sec. 672, Andrews v. Lynch, 27 Mo. 167; Burns v. Patrick, 27 Mo. 434; Syme v. Steamboat, 28 Mo. 335; Weil v. Greene County, 69 Mo. 281; Wells v. Mutual Benefit, 126 Mo. 630 State *ex rel.* v. Smith, 141 Mo. 1; State *ex rel.* v. Smith, 177 Mo. 69, 92; Kaukauna v. Green Bay Co., 142 U. S. 254)."

Defendant in error (plaintiff in this case) in the trial court predicated its right to recover on **the only statute of Missouri applicable thereto (Sections 3173 and 3211,** R. S. 1909), and in the prayer of its petition said:

"Plaintiff avers that it **is damaged and aggrieved** by reason of said illegal freight charge, in the sum of $80.05. Wherefore, he prays judgment for the same and for said damages not exceeding $1,000.00, and for all other, general relief **according to the statute in such case made and provided.**"

And the Missouri Supreme Court stated the issues in the following language:

"The answer admitted that defendant was a corporation and owned and operated the lines of railway mentioned in the petition, on which it

was a common carrier of freight and passengers, and denied generally all other allegations of the petition. It also **pleaded specially the unconstitutionality of certain statutes on which it assumed the petition was formed.** Issue was joint on all these pleas by demurrer and replication" (Rec., p. 39).

The Court further said (Rec., pp. 39-40):

"The statement filed by the appellant in pursuance of the terms of Section 280 of the Revised Statutes of 1909, and the rules of this court made in pursuance thereof closes with a clear and concise presentation of the issues, as follows:

"'It is conceded that the rates charged, the distances between the different points and the amount of coal shipped, are as stated by the plaintiff, and the issues of law before this court are:

"'1. Whether the plaintiff paid the freight on the several shipments and was in fact damaged as alleged in its petition and is the proper party to bring this action.

"'2. Whether, regardless of who in fact paid the freight, the respondent has been damaged, and is therefore entitled to recover.

"'3. Whether the sections of the statute on which this action is based are constitutional.

"'The latter proposition has been decided adversely to the contention of the appellant by this court in prior actions between the

same parties, but the question as to whether or not plaintiff can recover for damages, if any, sustained by the consignee who in fact paid the freight, has never been passed upon by this court.'

"Notwithstanding this frank declaration, the appellant **has favored us with an elaborate brief upon the constitutional questions raised in the trial of the case** which are the same in all respects as those involved in the following cases: McGrew v. Mo. Pac. Ry. Co., 177 Mo. 533; Same v. Same, 230 Mo. 496; Same v. Same, 258 Mo. 23; Same v. Same, 178 S. W. 1179."

It will thus be seen that the Court recognized that the constitutional questions were in the pleadings as well as in the briefs of counsel, and a reference to the Record (pages 15-16) discloses the following paragraphs:

"For further answer to said petition and to each and every count thereof, said counts being numbered one to fifty-two, inclusive, the defendant says that Section 12 of Article XII of the Constitution of Missouri, 1875, and Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, are in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States in this: That said sections of the Constitution of Missouri and of the Revised Statutes of Missouri, deprive defendant of its property without due process of law, and denies to it equal protection of the laws.

"For further answer to said petition and to each and every count thereof, said counts being numbered one to fifty-two, inclusive, the defendant says that Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, are repugnant to and in violation of Article V of the Amendments to the Constitution of the United States in this: That said sections deprive the defendant of its property without due process of law.

"For further answer to said petition and to each and every count thereof, said counts being numbered one to fifty-two, inclusive, the defendant says that Sections 3173 and 3211, and Sections 3185 and 3193 of the Revised Statutes of Missouri 1909, and Section 12 of Article XII of the Revised Statutes of Missouri 1909, and Section 12 of Article XII of the Constitution of Missouri 1875, are in conflict with Section 8 of Article I of the Constitution of the United States and the various laws passed by Congress thereunder, in this: That the said defendant is engaged in interstate commerce and owns and operates various lines of railroad as a part of its system, which run into other states than Missouri and into the states of Kansas, Colorado, Nebraska, Oklahoma, Illinois, Arkansas and Louisiana, and that the train in which the plaintiff's property described in said counts was being transported was at the time engaged in interstate commerce and contained carload lots and shipments of merchandise consigned and being carried from points without the State of Missouri to points within this State, and from points

within this State to points without the same, and from points without this State across the State of Missouri, and to points in other states, and that by reason of the premises this State is without jurisdiction to adopt and pass the sections herein named and to enforce the provisions of the same against this defendant while so engaged in interstate commerce.

"For further answer to said petition and to each and every count thereof, said counts being numbered one to fifty-two, inclusive, the defendant says that Sections 3173 and 3211, and Sections 3185 and 3193 of the Revised Statutes of Missouri 1909, **and Section 12 of Article XII of the Constitution of Missouri 1875, are in conflict with Section 8 of Article I of the Constitution of the United States** and the various laws passed by Congress thereunder in this: That the defendant's railroad is an interstate road and its lines extend over and through the states of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louisiana, and that it is engaged in interstate commerce over its said lines through all of the said states, and operates trains over the same in transporting freight and passengers through said states; that said section of the Constitution of Missouri and sections of the Revised Statutes seek to compel the defendant arbitrarily to fix its rates in this State, and in all of said states, and in comparison with rates existing in all such states, without regard to the laws passed by Congress regulating interstate commerce."

To sustain the jurisdiction of this Court it is necessary that a constitutional question be presented in the proper manner, and when so presented the jurisdiction of the Court attaches for its determination.

Justice Harlan, speaking for this Court in

Insurance Co. v. Needles, 113 U. S. 574,

said:

> "Our jurisdiction is not defeated because it may appear upon examination of this Federal question, that the statutes of Illinois **are not** repugnant to the provisions of that instrument. Such an examination **itself involves the exercise of jurisdiction.**"

The jurisdiction of this Court to consider a cause attaches when a substantial dispute or controversy is shown, or as stated by Chief Justice White in

Insurance Co. v. Austin, 168 U. S. 695,

> "The claim must be real and colorable, not fictitious and fraudulent. The contention here made, however, is, not that the bill, without color of right, alleges that the state law and city ordinances violate the Constitution of the United States, but that such claim as alleged in the bill is legally unsound. The argument, then, in effect, is that the right to a direct appeal to this court does not exist where it is claimed that a state law violates the Constitution of the United States, unless the claim be well founded. But it cannot be decided whether the claim is meritorious and should be maintained without taking

jurisdiction of the case. The authorities referred to as supporting the position indicate that the argument is the result of a confusion of thought, and that it arises from confounding the power of this court to review on a writ of error the action of a state court with the power exercised by this court, under the Act of 1891, to review by direct appeal the final action of the Circuit Court where, on the face of the record, it appears that the claim was made that the statute of a state contravened the Constitution of the United States. These classes of jurisdiction are distinct in their nature, and are embraced in different statutory provisions. **Having jurisdiction of the cause, there exists the power to consider every question arising on the record (Horner v. United States, 143 U. S. 570).**"

The Supreme Court of Missouri, in

Skinner v. Railroad, 254 Mo., l. c. 230,

said:

"Our jurisdiction is founded upon the constitutional question so stated. It has been insisted upon as a defense at every opportunity during the progress of the case. It is evidently presented in good faith, and even should its decision be unnecessary to the final disposition of this appeal, the jurisdiction will not be defeated (Dorrance v. Dorrance, 242 Mo. 625; Holder v. Aultman, 169 U. S. 81)."

That the contention of plaintiff in error is substantial and is being prosecuted in good faith is shown by the differences of opinion which have marked the decisions of these McGrew causes in the Supreme Court of Missouri. The case in the **230th Missouri 695** was one in which the six Judges were equally divided in opinion, a special Judge being selected, in pursuance of Missouri procedure, who delivered the opinion of the Court, three of the Judges, Woodson, Burgess and Fox, Chief Justice, dissenting; and the present case (Rec., p. 46) was likewise decided by the vote of four Judges, Goode and Woodson dissenting; Graves, Judge, marked as not sitting. The opinion of Judge Graves, however, relative to the subject matter of this litigation is indicated in his separate concurring opinion in case of

Mo. Southern R. R. v. Pub. Service, Commission, 214 S. W. Reporter 381,

decided by the Supreme Court of Missouri July 9, 1919, wherein he said:

> "Our learned brother says that the Public Service Commission based its finding upon the fact that the rate charged violated Section 12 of Article XII of the State Constitution, as said provision of the Constitution has been construed by this Court in the several McGrew cases. As a Judge I have never sat in any of the McGrew cases. I was at one time of counsel in the second

of those cases, although on this bench when it came here. For that reason I have never participated in any of those cases. As a lawyer, **I was never able to bring my mind to the Court's logic or law in those cases. Nor do I agree to them now.** However, the last of the line of McGrew cases decided here was taken to the United States Supreme Court, and that Court has placed its stamp of approval on the judgment of my brothers, and I feel constrained now to yield to the construction given in those cases.

"I am not convinced of the logic of those cases, but the rule is now settled by the highest arbiter, and I yield. With this explanation, I concur in the opinion."

II.

The enforcement of the provisions of Section 3173, Revised Statutes of Missouri, and Section 12 of Article XII of the Missouri Constitution, imposes an unreasonable burden upon interstate commerce.

The case of

Wabash Ry. Co. v. Illinois, 118 U. S. 557,

came to this Court on a writ of error to review a decision of the Supreme Court of Illinois. The statute involved was the long-and-short-haul provision of that State. In the course of the opinion this Court said:

"If the Illinois statute could be construed to apply **exclusively** to contracts for a carriage which begins and ends within the State, **discon-**

nected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago or from Chicago to Alton. The charges for these might be within the competency of the Illinois Legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States, or interstate commerce, but is exclusively commerce within the State."

One of the paragraphs of the railway company's answer which was stricken out in the trial court was as follows:

"For further answer to said count the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article XII of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article I of the Constitution of the United States and the various laws passed by Congress thereunder, in this: that the defendant's railroad is an interstate road and its lines extend over and through the States of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louisiana, and that it is engaged in interstate commerce over its said lines through all of said states, and operates trains over the same in transporting freight and passengers through said states; that said section of the Con-

stitution of Missouri and sections of the Revised Statutes seek to compel defendant arbitrarily to fix its rates in this State and in all of said states and in comparison with rates existing in all of such states, **without regard to the laws passed by Congress regulating interstate commerce**" (Rec., p. 20).

In the stipulation which was filed in the case now before the Court, it is stated that:

> "It is further agreed that the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this State to points without the State, from points without the same to points within this State, and from points without this State, through this State, and to points in other states" (Rec., p. 34).

This Court will take judicial notice that plaintiff in error was engaged in interstate commerce. The Supreme Court of Missouri, in the case of

State v. Railroad, 212 Mo., l. c. 676,

said:

> "May we or may we not take judicial notice of the fact that the Missouri Pacific Railway Company is engaged in interstate as well as intrastate commerce? It is argued on behalf of the State that we may not (absent proof or allegation in the indictment, as here) assume defendant is so engaged. But it seems to us we ought not to allow controlling force to that suggestion. And this, because:

"The trend of the judicial mind is to expand the judicial horizon, and, as decided cases ripen into precedents, it is made manifest that the list of things of which courts take judicial notice is being sensibly added to by growth. For instance, in Kansas City v. Scarritt, 169 Mo., *l. c.* 485, it is said: 'Almost everyone knows that a burial ground does not enhance the value of the surrounding property, **and there is no reason why courts should pretend to be more ignorant than the rest of mankind.**' As put in another case (Henry County v. Salmon, 201 Mo., *l. c.* 161: 'To this end we may assume a knowledge of events of current public history; for courts ought not to proceed on the theory that they do not know what everyone else does know.' It was said in State *ex rel. v.* Cook, 171 Mo., *l. c.* 357-8: 'It is a fact of common knowledge, of which the Court may take cognizance, that in 1891 there were several foreign railroad companies which had theretofore approached our border with their roads, and, under the express leave of the statute above quoted, had extended their lines into this State, some crossing it from one side to the other, some penetrating it to St. Louis, some to Kansas City, and some to other points.' If, now, as held in the Cook case, we may take judicial notice of things there enumerated, would we not be (to borrow an inspired metaphor—Matt. 23-24) 'Blind guides, which strain at a gnat and swallow a camel,' if we refused to take judicial notice of the patent and large fact that defendant is now and always has been actively engaged in interstate commerce? As pointed out by defendant's

learned counsel, we know as well that defendant's railroad is a main-traveled highway, a throbbing artery of commerce stretching from St. Louis on the eastern line of this State to Kansas City on the western line and away into other States, as we know that the Missouri River exists as a navigable stream and takes the same course."

And this Court in

Underhill v. Hernandez, 168 U. S. 1. c. 253,

said:

"In this case the archives of the State Department show that civil war was flagrant in Venezuela from the spring of 1892; that the revolution was successful; and that the revolutionary government was recognized by the United States as the government of the country, it being, to use the language of the Secretary of State in a communication to our Minister of Venezuela, 'accepted by the people, in the possession of the power of the nation and fully established.'

"That these were facts of which the Court is bound to take judicial notice, and for information as to which it may consult the Department of State, there can be no doubt. **Jones v. United States, 137 U. S. 202; Mighell v. Sultan of Jahore (1894), 1 Q. B. 149.**"

The Supreme Court of Texas in

Ry. Co. v. State, 72 Tex. 404; 10 S. W. Reporter, 81,

said:

"The Supreme Court of the United States says: 'It certainly cannot be laid down as a universal or even as a general proposition that the Court can judicially notice matters of fact. Yet it cannot be doubted that there are many facts, particularly with reference to geographical positions of such public notoriety, and the knowledge of which is to be derived from other sources than parol proof, which the Court may judicially notice. Thus in the case of **U. S. v. LaVengeance, 3 Dall. 297,** the Court judicially noticed the geographical position of Sandy Hook. And it may certainly take notice judicially of like notorious facts, as that the Bay of New York, for instance, is within the ebb and flow of the tide.' **Peyroux v. Howard, 7 Pet. 324).** 'A court is bound to take judicial knowledge of the leading geographical features of the land, the minuteness of the knowledge so expected being in inverse proportion to the distance' (1 Whart. Ev. Sec. 329). The principle has been applied in various ways, as the following cases will show: Trenier v. Stewart, 55 Ala. 458; Gibson v. Stevens, 8 How. 399; Vanderwerker v. People, 5 Wend. 530; Pearce v. Langfit, 101 Pa. St. 507; Steinmetz v. Turnpike Co., 57 Ind. 457; Tewksbury v. Schulenberg, 41 Wis. 584; Walker v. Allen, 72 Ala. 456; Oppenheim v. Wolf, 3 Sandf. Ch. 571; Neaderhouser v. State, 28 Ind. 257. In Railway Co. v. Rushing, 69 Tex. 306, 6 S. W. Rep. 834, Chief Justice Willie says: 'It may be that this Court, judicially knowing the geography of the State, might take notice of the general direction of

these two roads, as fixed by the statutes under consideration, that their lines must necessarily cross each other, and could therefore treat them as connecting lines, and not parallel to each other. But as to whether they are competing lines, we can have no judicial knowledge whatever.' This latter proposition, as a general rule, and as applied to the case then before the Court, is undoubtedly correct. Whether two roads which intersect each other at a certain point are competitors for freight or not must depend upon a variety of circumstances not known to the Court. But the authorities cited show that we must take notice of the geography of the State, and at least of its navigable streams. It is a matter of history that important lines of railroad, once established, have remained as fixed and as permanent in their course as the rivers themselves. They supersede, in the main, all other modes of travel between the points which they touch, and become as well, if not better, known than any other geographical feature of the country. Their locality becomes 'notorious and indisputable.' For instance, can we doubt that the Houston & Texas Central road runs from Houston to Dallas, and that the Gulf, Colorado & Santa Fe touches with its lines the same point? Can we doubt that they run during a considerable portion of their lines practically parallel to each other, and that they must necessarily compete for the traffic lying between them? We think we must take judicial notice that these two roads are parallel and competing lines, and this is sufficient, so far as the disposition of this case is concerned."

The same hauls, therefore, in which plaintiff's coal was transported involved interstate hauls, and on such interstate hauls, from Myrick, Missouri, for example, to a point in the State of Kansas, the interstate shipper was charged and paid the same rate on the portion of the haul from Myrick to Independence, Missouri, that the consignee of McGrew Coal Company paid on its haul from Myrick to Independence *en route* to its final destination. The comparison of rates in the second count of plaintiff's petition is a comparison between the haul from Myrick to Boonville, in the State of Missouri, **and the interstate haul from Liberal, Missouri, through a portion of the State of Kansas**, to Granby, Missouri.

Section 3173 of the Revised Statutes of Missouri, regulating the charges for these hauls, does not purport to be confined to **transportation wholly within the State of Missouri**, but its prohibitions are directed against any railroad corporation which, in the State, "shall, directly or indirectly, charge or collect for the transportation of goods, merchandise or property on its road **for any distance** any larger or greater amount as toll or compensation than is charged or collected for the transportation of similar quantities of the same class of goods, merchandise or property over a greater distance **upon the same road**, etc.

This Court said in the case of

Wilmington Transportation Company v. Railroad Commission, 236 U. S., l. c. 155:

"It was by the application of these principles that it was decided that a State could not prescribe rates for interstate railroad transportation, even with respect to that portion of the route which was within its own territory. As was said by Mr. Justice Miller in delivering the opinion of the Court upon this question (Wabash Railway v. Illinois, 118 U. S. 557-577), after recognizing the authority of the State to prescribe intrastate rates: 'But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, **its own methods to prevent discrimination in rates**, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be over-estimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said.' And the same conclusion has been reached with respect to the fixing of rates for railroad transportation which, **while beginning and ending in the same State, passes through the territory of another State.** The regulation of such rates cannot be split up according to the jurisdiction of the respective States over the track. There must be one rate fixed by one authority."

When this Court holds, as it did in the **Kirby case** (Kirby v. C. & A. R. R., 225 U. S. 155), that any unreasonable preference accorded to a shipper amounted to a discrimination under the Act to Regulate Commerce, it is difficult to see how the recurrent recoveries of large damages by the defendant in error, under the Missouri statute—which applies equally to intrastate and interstate shipments—would not constitute a flagrant violation of the Act to Regulate Commerce in thus awarding the defendant in error unreasonable discriminations, concessions and preferences not received by its competitors, or other shippers.

This Court said, in

L. & N. R. R. Co. v. Eubank, 184 U. S. 33:

> "We have already held in the case of **L. & N. R. R. Co. v. Kentucky, 183 U. S. 503**, that the section of the Kentucky Constitution above set forth, as applied to places **all of which are within the State**, violates no provision of the Federal Constitution. The effect of the decision of the State court now under review is to hold that the provision of Section 218 of the State Constitution is not confined to a case where the long and short hauls are both within the State of Kentucky, but that it extends to and embraces a long haul from a place outside of to one within the State, and a shorter haul between points on the same line and in the same direction, both

of which are within the State, and the question is whether the provision of that Constitution as thus construed is or is not a violation of the commerce clause of the Constitution of the United States. * * * We fully recognize the rule that the effect of a State constitutional provision or of any State legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the State to a point within it, or from a point within to a point without the State, interstate commerce is thereby affected and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important and not a mere incident.

"Although not exactly in point, yet the case of **Wabash, St. Louis, Etc., Ry. v. Illinois, 118 U. S. 557**, is somewhat analogous in principle."

After a discussion of the facts in the Eubank case the Court further said (page 41):

"The facts in this case have been thus fully referred to for the purpose of showing how directly and also how injuriously such a provision **might affect interstate commerce**. Other cases may be supposed where the effect might not be so oppressive, but the fact which vitiates the provision is that it compels the carrier to regulate, adjust or fix the interstate rates **with some reference at least** to his rates within the

State, thus enabling the State by constitutional provision or by legislation to directly affect, and in that way to regulate to some extent interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress."

III.

The petition in the cause, as heretofore stated, alleged that defendant in error (plaintiff below) was damaged and aggrieved by reason of the alleged illegal freight charge and judgment was prayed for the amount of said damages. When a similar cause was before this Court **(244 U. S. 191)** the Court intimated that a shipper injured by a violation of the constitutional provision had a right to recover "any overcharge paid by him", but the trial court and the Missouri Supreme Court in the present case, allowed a recovery, although it was apparent from the stipulation in the record that the defendant in error **had not paid** the freight charges.

In its construction of the long and short haul clause of the Interstate Commerce Act, the Interstate Commerce Commission has invariably required that there be proof of pecuniary damage to justify an award of reparation.

In

Oregon Fruit Co. v. S. P. Co., Vol. 50, I. C. C. Reports, p. 722,

the Commission said:

> "It has frequently been held that nothing in the Act to Regulate Commerce warrants a presumption of damage. The distinction is plain between the carrier's unlawful act, which might render it liable to prosecution, and the shipper's right to damages for the injury, if any, occasioned thereby. In the absence of proof of damage to the shipper the fact that carriers have charged or received rates which violate the long-and-short-haul rule of the Fourth Section of the act is not of itself a sufficient basis for an award of reparation (Penn. R. R. Co. v. International Coal Co., 230 U. S. 184; Nix & Co. v. S. Ry. Co., 31 I. C. C. 145, 149; Chattanooga Implement & Mfg. Co. v. L. & N. R. R. Co., 40 I. C. C. 146; LaCrosse Shippers Asso. v. C. I. & L. Ry. Co., 43 I. C. C. 520, 524; United States Glue Co. v. C. & N. W. Ry. Co., docket No. 6832, unreported)."

In the Nix case the Commission said:

> "The mere fact that the rates charged were maintained in violation of the Fourth Section of the act, while it may make the carrier subject to a prosecution under the act for the recovery by the Government of the penalties prescribed for the violation thereof, does not, **in the absence of proof of damage to the shipper,** afford a basis for an award or reparation in his favor."

In the case of

Sharpless v. Lawrence, 213 Fed. Rep. 427,

the Court said:

"The word 'damage' as a word of art has a clear and definite legal meaning. It is defined by Bouvier to be 'the indemnity recoverable by a person who has sustained an injury, either in his person, property or relative rights, through the act or default of another.' The word has also been defined as 'a sum of money adjudicated to be paid by some person to another as a compensation for loss sustained by the latter in consequence of an injury committed by the former'. These and other definitions given by the courts, though in varying language, include the concept of indemnity or compensation for actual loss. It is a legal term of clear import, and an unnecessary and harmful confusion of thought would ensue from treating it otherwise. In the recent case of Penn. R. R. v. International Coal Co., 230 U. S. 184, the Supreme Court of the United States, in dealing with the Eighth Section of the Act to Regulate Commerce, giving a right of action to a shipper injured by an act of a common carrier prohibited by the statute and making 'such common carrier * * * liable to the person injured thereby for the full amount of **damages** sustained in consequence of any such violation of the provisions of the act', used this significant language: 'The statute gives a right of action for **damages** to the **injured party**, and by the use of these legal terms clearly indicates that the dam-

ages recoverable were those known to the law and intended as compensation for the injury sustained.' We are of the opinion, therefore, that this Court, in affirming the decree of the court below, 'that the complainant recover of defendant the damages sustained by said complainant from the unlawful acts of the defendant herein adjudged' did not and could not do otherwise than impute to the words 'damages sustained by said complainant' the legal meaning attaching thereto as above indicated."

Wade, District Judge, in

Homestead Company v. Electric Company, 226 Fed. 53,

said:

"As a general proposition, I do not think that the difference in rate is the measure of damages. I think a great deal of confusion has arisen by failing to keep in mind the real basis of the cause of action for damages. The injured person was not injured by reason of the higher rate charged to him, it being conceded that such rate was reasonable. If he has been damaged it is because of the lower rate charged his competitor, and, this being true, the difference between such lower rate and the higher rate charged a competitor cannot always measure the loss actually sustained as a direct result of the discrimination.

"In this case the plaintiff was engaged in 'printing a weekly newspaper and doing a job printing and electrotyping business'. Its competitor was engaged in running a newspaper and job printing plant in said city under like condi-

tions'. Suppose that each was running a weekly newspaper, differing in politics and policies. Each would have its own circle of subscribers and readers. While in a sense the parties would be competitors, yet they are not competitors in such a sense as that the difference in the rate charged for electricity would be the true measure of damages arising out of the fact that one received a lower rate than the other. If the other party was entitled to a lower rate, as a matter of law, then, of course, the difference between that and the higher rate would be the true measure; but, when the damages to be recovered must be the direct and proximate result of the lower rate, it must follow that the difference in rate is not the true test as applied to such case.

"The Supreme Court of the United States, in Pennsylvania Company v. Coal Co., 230 U. S. 184, fully reviews all the authorities, and upon this matter of damages says: 'But it does not at all follow that the amount of injury suffered is the difference in the rates charged. It might be, or it might not be; but, in any event, it must be the subject of proof.' "

The United States Circuit Court of Appeals said, in **Lehigh Valley R. R. Co. v. American Hay Company, 219 Fed. Rep. 541:**

"Finally it is contended that in an action under section 16 of the act there must be proof of damages sustained, and that such proof is lacking here.

"As a matter of first impression, it would seem that when one shipper is made to pay a railroad, through discrimination either in rebates or in charges for special services, a definitely ascertained larger sum than his competitors are charged for transportation of goods, he is damaged to that amount, or at least there is a *prima facie* showing of damages sustained by himself. Two decisions of the Court of Appeals for the Third Circuit are to the contrary of this proposition (Lehigh Valley Railroad v. Clark, 207 Fed. 717, 125 C. C. A. 235; Lehigh Valley Railroad v. Meeker, 211 Fed. 785, 128 C. C. A. 311), and it seems to us that the decision of the Supreme Court in Pennsylvania Railroad v. International Coal Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, requires the same conclusion. In that case by means of rebates given to others and refused to itself the shipper had been charged for transportation a greater sum than was collected from its competitors. The amount of the excess was determined and the fact that it was paid to the railroad was proved. The Court said: 'But the plaintiff may have sold at the usual profit all or part of its 40,000 tons at the regular market price; the purchaser, on his own account, paying freight to the point of delivery. In that event, not the shipper, but the purchaser, who paid the freight, would have been the person injured, if any damage resulted from giving rebates.'

"The facts in the case at bar seem to us indistinguishable from those in the case last cited. It is not enough to show that the American Hay Company paid the railroad these various items

of $2.00; for aught that appears the persons to whom it sold may have themselves paid all those charges, or some of them, or some part of each charge. Just how the initial payment of each $2.00 resulted in damages to the company, if it were damaged, is a matter wholly within the knowledge of the hay company, and not presumably within the knowledge of the railroad company. Proof that damages did result from the initial payment is part of the plaintiff's case, and, without affirmative proof to show such damages, it was not entitled to a verdict.

"The judgment is reversed."

The decision of this Court in the case of

Southern Pac. Co. v. Darnell-Taenzer Co., 245 U. S. 531,

does not justify the construction placed upon it by the Missouri Supreme Court. This Court there said:

> "But here the plaintiffs **have paid cash out of pocket** that should not have been required of them, and there is no question as to the amount of the proximate loss **(Meeker v. L. V. R. R. Co., 236 U. S. 429; Mills v. L. V. R. R. Co., 238 U. S. 473).**"

In the case at bar plaintiff did not pay the freight, but, by arrangement, instead of quoting a price on board of cars at Myrick (shipping point), quoted a price delivered to the consignee's stations, which quo-

tation was based on the price at Myrick plus the freight rate charged by the Railroad Company, and it is distinctly stated in the stipulation of facts:

> "When the coal was received by the consignees **such consignee paid defendant's agent the freight charges** and forwarded the receipted freight bill to the plaintiff to be credited on the price of said coal as part payment therefor and then such consignee paid the plaintiff the difference between such freight bill and the quotation price" (Rec., p. 34).

It is evident, therefore, that this is a case where a plaintiff is suing under a statute which authorizes a right of action in favor of the party aggrieved and for the damage alleged to have been sustained by him, when the facts proven show that he sustained no damage whatever, and to require a railroad company to pay damages under such circumstances is the taking of its property without due process of law.

IV.

The reported decisions of the Missouri Supreme Court indicate that defendant in error is the only litigant who has sought to enforce the provisions of Sections 3173 and 3211, R. S., 1909, and the provision of the Missouri Constitution on which the Missouri Supreme Court based its decision, and it, also, appears that the Public Service Commission, which

body now has jurisdiction of the regulation of railroad rates and charges in the State of Missouri, declines to enforce a mileage schedule of rates on coal in that State.

In the case of

Application of Mo. Pac. Ry. Co. for Adjustment of Rates on Coal, 4 P. S. C. Reports, l. c. 9,

the Commission said:

> "It has been found in actual practice that a **mileage** schedule of rates on coal cannot be successfully applied, but that the so-called **blanket** or **zone system** must be used. At the hearing this fact was admitted to be true by all parties in interest.
>
> "The location of coal mines is not subject to the desire of the owner and cannot be provided with reference to geographical advantages as compared to the market, but they are where nature has located them. Supplying a market like Kansas City, possibly one of the largest in the West, it is found that coal is produced at various distances, and, generally speaking, in all directions. If the closest mine to Kansas City is located some 40 miles distant and in Kansas, while another mine is located on another road some 52 miles distant in Missouri, it naturally follows that the supplying of the market will be met with coal from the closest mine if a **mileage** schedule of rates is adopted, and it would mean that the line handling the coal from the Missouri mine

would be deprived of the revenue produced by the handling of that traffic, unless it met the rate of the Kansas company."

We respectfully submit, that the record in this case shows that plaintiff in error has contended that Section 12 of Article XII of the Constitution of Missouri is in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, and that it is also in violation of Section 8 of Article I of the Federal Constitution; that the contention of plaintiff in error is substantial and meritorious and that this court has jurisdiction of the writ of error herein.

All questions appearing in the record should, therefore, be considered by the Court in due course, and we ask that the motion of defendant in error to dismiss or affirm be overruled.

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Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
McGREW COAL COMPANY,
Defendant in Error.
} No. 265.

In Error to the Supreme Court of the State of Missouri.

BRIEF OF PLAINTIFF IN ERROR.

JAMES F. GREEN,
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Of Counsel.

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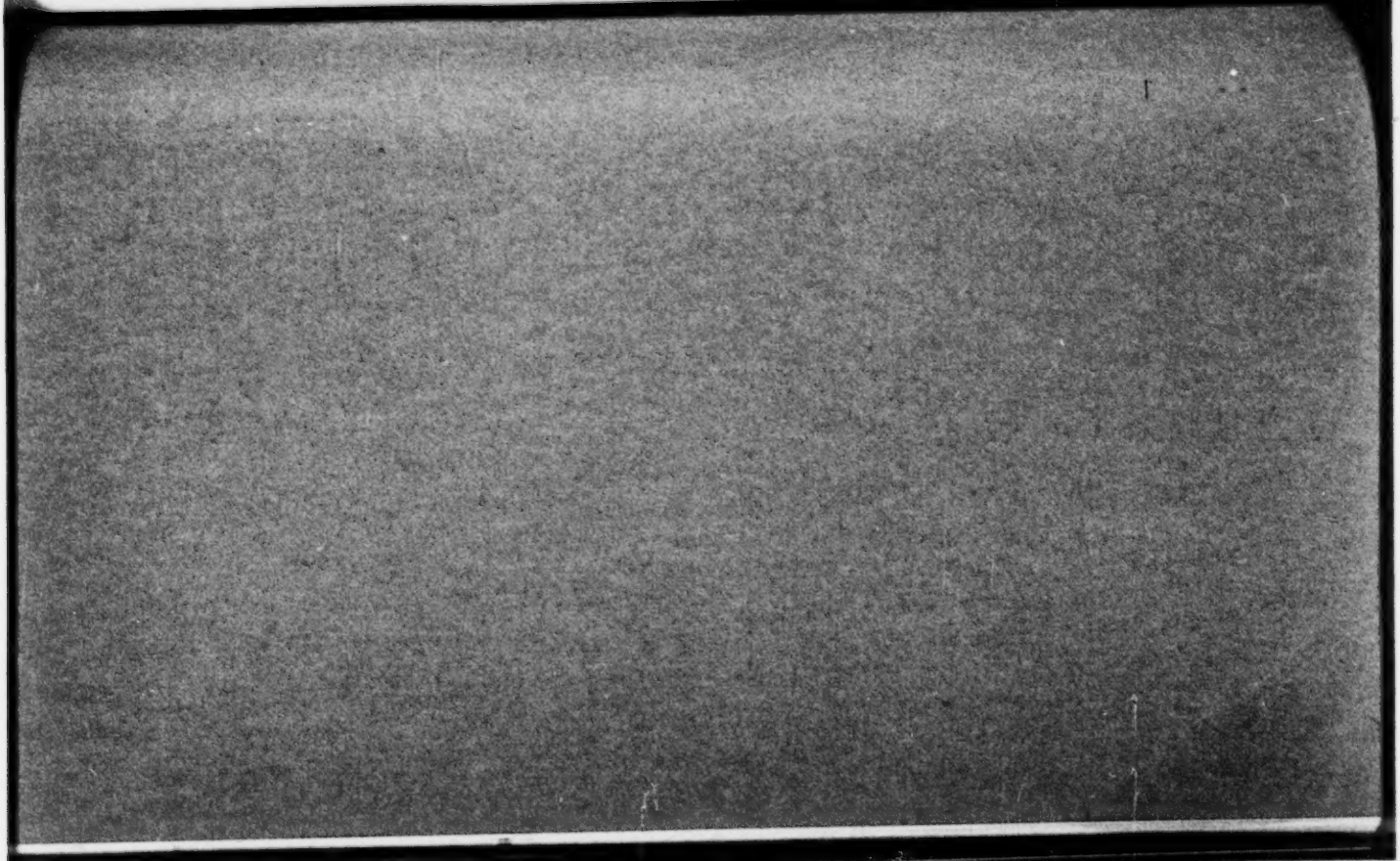

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
McGREW COAL COMPANY,
Defendant in Error.
No. 265.

in Error to the Supreme Court of the State of Missouri.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

The McGrew Coal Company recovered judgment in the Circuit Court of Lafayette County on the 20th day of April, 1915, in the sum of $14,303.77. This

judgment was thereafter affirmed by the Supreme Court of the State of Missouri.

The petition of defendant in error contains fifty-two counts or statements of separate causes of action, and it is alleged in each of the counts that, on shipments of coal from the mines of the Coal Company at Myrick, Missouri, to various stations on the line of the railway of plaintiff in error the Coal Company had been charged a higher rate per ton than was charged for shipments of coal between other points on the line of said railway for a greater distance.

The several counts of the petition are similar except with respect to the allegations therein as to the points or stations between which the shipments were made, the weights of the coal, and the rate with which comparison is made, and it is, therefore, only necessary to print the first count or cause of action, which (omitting caption and signature) is as follows (Rec., p. 13):

> "Plaintiff avers that on April, 1908, it was and still is a coal mining company incorporated under the law of the State of Missouri.
>
> "Plaintiff for first cause of action avers that on October, 1879, the defendant was, and has ever since been, a railroad corporation, duly organized under the law of said State, and a common carrier for hire of freight and passengers between its stations hereinafter named in said State.

"That within five years last past, and on the dates hereinafter named in Exhibit No. 1, plaintiff produced and sold bituminous coal from its mines near Myrick, one of defendant's stations in said county, and that on the various dates named in Exhibit No. 1, and in the cars therein described by number and initial, he shipped, by defendant's road, from said Myrick in the aggregate 640,400 pounds of his said coal in carload lots to the consignees named in said exhibit at Blackwater, another station on defendant's road in said State.

"Plaintiff avers that for the said carriage of said coal defendant fixed, charged, demanded and received of the plaintiff 65 cents per ton, an illegal freight rate, being 25 cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all said times and dates herein named defendant had fixed, charged, demanded and received for the carriage of the same class of coal over its said line and over another part of its said road from its station of Waverly, and to another of its said stations, viz., Kansas City, in said State, a distance of 63.84 miles, 40 cents per ton by the carload, while the distance from said Myrick to said Blackwater was only 60.62 miles, for which said rate of 65 cents per ton for said carriage was fixed, charged, demanded and received of plaintiff as aforesaid; and the same was illegal and exceeded the amount the defendant was entitled to fix, charge, demand and receive for said shipments by the sum of $80.05.

"And the plaintiff avers that it is damaged

and aggrieved by reason of said illegal freight charge in the sum of $80.05. Wherefore, he prays judgment for the same and for said damages not exceeding $1,000, and for all other and general relief according to the statute in such cases made and provided."

The answer of the Railway Company was a general denial and contained among other averments the following:

"For further answer to said petition and to each and every count thereof, said counts being numbered one to fifty-two, inclusive, the defendant says that Section 12 of Article XII of the Constitution of Missouri, 1875, and Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, are in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States in this: That said sections of the Constitution of Missouri and of the Revised Statutes of Missouri deprive defendant of its property without due process of law and denies to it the equal protection of the laws.

"For further answer to said petition and to each and every count thereof, said counts being numbered one to fifty-two, inclusive, the defendant says that Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, are repugnant to and in violation of Article V of the Amendments to the Constitution of the United States in

this: That said sections deprive the defendant of its property without due process of law.

"For further answer to said petition and to each and every count thereof, said counts being numbered one to fifty-two, inclusive, the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article XII of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article I of the Constitution of the United States and the various laws passed by Congress thereunder in this: That the said defendant is engaged in interstate commerce and owns and operates various lines of railroad as a part of its system which run into other states than Missouri and into the states of Kansas, Colorado, Nebraska, Oklahoma, Illinois, Arkansas and Louisiana, and that the train in which the plaintiff's property described in said counts was being transported was at the time engaged in interstate commerce and contained carload lots and shipments of merchandise consigned and being carried from points without the State of Missouri to points within this state, and from points within this state to points without the same and from points without this state across the State of Missouri and to points in other states, and that by reason of the premises this state is without jurisdiction to adopt and pass the sections herein named and to enforce the provisions of the same against this defendant while so engaged in interstate commerce.

"For further answer to said petition and to each and every count thereof, said counts being

numbered one to fifty-two, inclusive, the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1889, and Section 12 of Article XII of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article I of the Constitution of the United States, and the various laws passed by Congress thereunder in this: That the defendant's railroad is an interstate road and its lines extend over and through the States of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louisiana, and that it is engaged in interstate commerce over its said lines through all of the said states and operates trains over the same in transporting freight and passengers through said states; that said section of the Constitution of Missouri and sections of the Revised Statutes seek to compel the defendant arbitrarily to fix its rates in this state and in all of said states and in comparison with rates existing in all such states without regard to the laws passed by Congress regulating interstate commerce."

Defendant in error filed a demurrer to all of the special defenses pleaded in the answer to the several counts of the petition, numbered from one to fifty-two, inclusive; the trial court sustained the demurrer, and to the last two paragraphs of the answer of the Railroad Company plaintiff filed the following replication:

"Now comes plaintiff, for reply to the last two special defenses set forth in the answer of the defendant wherein it is alleged, among other things, that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article XII of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article I of the Constitution of the United States, and the various laws passed by Congress thereunder, and denies each and every allegation therein contained.

"And for further reply, the plaintiff avers that all of the points and stations specified in the petition and each count thereof are wholly within the State of Missouri, and are reached by defendant's cars wholly engaged in intrastate or domestic traffic, and that upon said coal being delivered by plaintiff to the defendant to be transported by it to the points as alleged in the petition the defendant issued to the plaintiff bills of lading therefor, and that thereafter plaintiff had no further control of said coal and at no time directed that the cars containing said coal should be incorporated in trains engaged in interstate traffic, and that if any of said cars were so placed in trains doing interstate commerce it was done on the defendant's own motion and for defendant's own convenience, and wholly without the knowledge or consent of the plaintiff.

"Wherefore, plaintiff reaffirms the allegations of its petition, and of each count thereof, and prays for judgment in accordance with the prayers of each of said counts."

It will be noted that the prayer of the petition is as follows:

> "Plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge **in the sum of $80.65. Wherefore, he prays judgment** for the same and for said damages not exceeding $1,000.00, and for all other and general relief according to the **statute in such case made and provided.**"

The Missouri Statute thus referred to is as follows:

> "Sec. 3173. **Freight Charges On, Regulated.**— No railroad corporation organized or doing business in this State, under any act of incorporation or general law of this State, now in force or which may be hereafter enacted, shall directly or indirectly charge or collect, for the transportation of goods, merchandise or property on its said road for any distance, any larger or greater amount, as toll or compensation, than is charged or collected for the transportation of similar quantities of the same class of goods, merchandise or property over a greater distance upon the same road, nor shall such corporation charge different rates for receiving, handling or delivering freight at different points on its road or roads connected therewith which it has a right to use, nor shall any such railroad corporation charge or collect, for the transportation of goods, merchandise or property over any portion of its road, a greater amount as toll or compensation than shall be charged or collected by it for the transporta-

tion of similar quantities of the same class of goods, merchandise or property over any other portion of its road of equal distance; and all such rules, regulations or by-laws of any railroad corporation, as fix, prescribe or establish any greater toll or compensation than is hereinbefore prescribed, are hereby declared to be void."

Section 3211 of the Revised Statutes of Missouri, 1889, is the provision of the Missouri law fixing the measure of recovery. That section is as follows:

"Section 3211. **Penalty for Overcharge on Freight.**—Any railroad corporation which shall fix, demand, take or receive, from any person or persons, any greater toll or compensation for the transportation, receipt, handling or delivery of goods or merchandise, in violation of the provisions of this article, shall forfeit and pay for any such offense any sum not exceeding one thousand dollars, and costs of suit, including a reasonable attorney's fee, to be taxed by any court where the same is heard by appeal or otherwise, to be recovered by civil action **by the party aggrieved**, in any court having jurisdiction thereof; and any officer, agent or employe of any such railroad corporation who shall knowingly or willfully violate the provisions of this article shall be liable to the penalties prescribed in this section."

At the time the case was called for trial a stipulation or agreed statement of facts was filed (Rec., p.

25), from which it appears that it was stipulated that the rates charged by the Railway Company, the amount of coal transported and the distances set out in the several counts of the petition were correctly stated therein, and said stipulation contained the further statement, to wit:

> "It is further stipulated that in this case the plaintiff in quoting the price of said coal to the several consignees named in the exhibits herein, instead of quoting f. o. b. at Myrick, quoted a price delivered to the consignees' stations, which quotation was based upon the price at Myrick, plus the freight rate charged by the defendant; when the coal was received by the consignees such consignee paid defendant's agent the freight charges and forwarded the receipted freight bill to the plaintiff to be credited on the price of said coal, as part payment therefor, and then said consignee paid the plaintiff the difference between such freight bill and the quotation price."

The various constitutional questions which were found in the answer of the Railway Company were renewed in its brief in the Supreme Court, and also in its motion for rehearing filed in that court.

After the affirmance of the judgment in the case by the Supreme Court of Missouri, plaintiff in error sued out its writ of error in the cause, and in its assignment of errors are the following (Rec., p. 110):

ASSIGNMENT OF ERRORS.

"Now comes the Missouri Pacific Railway Company, appellant, as a petitioner for a writ of error as set out in its petition, which is hereto attached, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Missouri in the above-entitled case there is manifest error, in this, to wit:

"I. That the Supreme Court of the State of Missouri erred in holding in its decision that Sections 3173 and 3211 of the Revised Statutes of the State of Missouri, 1909, were not in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, and in holding that said sections of Revised Statutes of Missouri do not deprive appellant of its property without due process of law and deny to it the equal protection of the laws.

"II. Because the Supreme Court of the State of Missouri, in its judgment and decision entered in this cause, erred in holding that Section 12 of Article XII of the Constitution of Missouri adopted in the year 1875, was not and is not in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, in holding that said provisions of the Constitution of the State of Missouri did not, and does not deprive appellant railway company of its property without due process of law, nor deny to appellant the equal protection of the laws.

"III. Appellant avers that the decision of the

Supreme Court of the State of Missouri and the judgment of said Court in banc in the above cause, in reaffirming and following the following decisions of the Supreme Court of said State in the cases of McGrew v. Railway Co., reported in 230 Mo. 496, and McGrew v. Railway Co., reported in 258 Mo. 23, deprive this appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

"IV. Appellant avers that Sections 3173 and 3211 of the Revised Statutes of the State of Missouri prohibit discrimination in all cases without regard to whether such discrimination is just or unjust, and the decision of the Supreme Court of the State of Missouri, in this cause, holding said sections of the statute constitutional and valid, deprives appellant of its property without due process of law and denies to it the equal protection of the law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

"V. Appellant further says, that the Supreme Court of Missouri erred in overruling appellant's motion for rehearing in this cause, in which motion it was averred that the decision of the Court denied to appellant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

"VI. Because, under the Supreme Court's interpretation of Section 12, Article XII of the Missouri Constitution, holding that said section of the Missouri Constitution is self-enforcing, notwithstanding said Section 12, Article XII of the

Constitution provides: 'And suitable laws shall be passed by the General Assembly to enforce this provision,' the decision in this case results in a repeal of that portion of Section 12, Article XII of the Missouri Constitution by judicial interpretation, and, in holding that appellant in the exaction of a greater charge for the transportation of freight for a shorter distance than for a longer distance had violated said section of the Constitution of Missouri, appellant was denied its property without due process of law, in violation of Section 30, Article II of the Constitution of Missouri and of the Fourteenth Amendment to the Constitution of the United States.

"VII. Because the Court permitted the respondent to recover under the Constitution of the State, Section 12 of Article XII, whereas, in his petition he sought a recovery under Section 3173, Revised Statutes of Missouri for 1909, and no recovery is sought in the petition under Section 12, Article XII, of the Constitution of Missouri; and, said section of the statute having been held unconstitutional by this Court in the case of Sloan v. Pacific Railroad, 61 Mo. 24, ever since said decision the law thereof has become a rule of property in this State, and to permit a recovery by the respondent under the Constitution in a case in which a recovery was only sought in the petition under said unconstitutional section of the Missouri statutes, denies the appellant the equal protection and benefit of the laws and due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

"VIII. Because the Supreme Court of Missouri, in the case of Sloan v. Pacific Railroad (61 Mo. 24), held what is now Section 3173, Revised Statutes of Missouri for 1909, unconstitutional as applied to the charter of the Pacific Railroad of Missouri, to which charter and franchise from the State the appellant in this case has succeeded as a property right, and, by permitting a recovery in this case under said section of the statute, in view of the transfer and assignment of the charter of the Pacific Railroad Company, as so interpreted in the Sloan case, to the appellant, the decision in this case impairs the obligation of appellant's charter and contract with the State, in violation of Section 15, Article II, of the Constitution of Missouri and Section 10, Article I of the Constitution of the United States.

"IX. Because the Court erred in holding that appellant was guilty of any discrimination in this case in exacting and putting into effect the statutory rates and charges approved by the Public Service Commission of the State of Missouri, in pursuance of the Public Service Commission Law of 1913, since said statutory rates and charges are the only lawful charges which the appellant could exact from the respondent; and, in holding in this case that the appellant had violated the law in putting said statutory rates and charges into effect, or that the exaction of such rates and charges could result in any wrongful act on appellant's part, the decision in this case denies the appellant the benefit of the equal protection of the laws and due process of law as applied to all other citizens of the State of Missouri, in viola-

tion of the Fourteenth Amendment to the Constitution of the United States.

"X. Because, under the charter granted to the Pacific Railroad Company of Missouri by the Legislature of the State of Missouri in the year 1849 (Acts 1849, p. 219), to which charter rights appellant has succeeded the said railroad company was given the right to receive such tolls and freight charges as should be determined by the directors of said company, and said Section 3173 of the Revised Statutes of Missouri, 1909, and Section 12 of Article XII of the Constitution of Missouri impair the obligation of the contract which had in 1849 been entered into between the State and the Railroad Company, in violation of Section 10 of Article I of the Constitution of the United States.

"XI. Because the Supreme Court of Missouri erred in adopting as its decision the opinion of Commissioner Brown, holding that respondent can recover in this case without proof of any damage sustained by him, and in holding that under the Constitution of the State of Missouri discrimination by railroads has been prohibited in all cases, without regard to whether such discrimination is just or unjust, reasonable or unreasonable, and the decision by the Court in this cause deprives appellant of its property without due process of law and denies to it the equal protection of the law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States."

BRIEF.

I.

The enforcement of the provisions of Section 3173, Revised Statutes of Missouri, and Section 12 of Article XII of the Constitution of that State, imposes an unreasonable burden upon interstate commerce. It should be noted that that section of the statute does not refer to transportation wholly within the State of Missouri, and the provision of the Constitution upon which the State Supreme Court justified its decision is as follows:

> "It shall not be lawful in this State for any railway company to charge for freight or passengers a greater amount for the transportation of same for a less distance than the amount charged for any greater distance; and suitable laws shall be passed by the General Assembly to enforce this provision, but excursion and commutation tickets may be issued at special rates" (Sec. 12, Article XII, Missouri Constitution).

This Court, in

Robbins v. Shelby Taxing District, 120 U. S., l. c. 492,

said:

> "The Constitution of the United States having given to Congress the power to regulate com-

> merce, not only with foreign nations, but among several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation." (Citing cases.) "Another established doctrine of this court is, that where the power of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereinafter mentioned, is repugnant to such freedom."

The case of

Wabash Ry. Co. v. Illinois, 118 U. S. 557,

came to this Court on a writ of error to review a decision of the Supreme Court of Illinois. The statute involved was the long-and-short-haul provision of that State. In the course of the opinion this Court said:

> "If the Illinois statute could be construed to apply **exclusively** to contracts for a carriage which begins and ends within the State, **disconnected from a continuous transportation through or into other states**, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago or from Chicago to Alton. The charges for these might be within the competency of the Illinois Legislature to regulate. The reason for this is that **both**

the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the states, or interstate commerce, but is exclusively commerce within the State."

One of the paragraphs of the Railway Company's answer which was stricken out in the trial court was as follows:

> "For further answer to said count the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article XII of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article I of the Constitution of the United States and the various laws passed by Congress thereunder, in this: that the defendant's railroad is an interstate road and its lines extend over and through the States of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louisiana, and that it is engaged in interstate commerce over its said lines through all of said states, and operates trains over the same in transporting freight and passengers through said states; that said section of the Constitution of Missouri and sections of the Revised Statutes seek to compel defendant arbitrarily to fix its rates in this State and in all of said states, and in comparison with rates existing in all of such states, **without regard to the laws passed by Congress regulating interstate commerce**" (Rec., p. 20).

The striking difference between the Interstate Commerce Commission Act and the Missouri statute is that Section 4 of the Interstate Commerce Law declares that it shall be unlawful for a common carrier, subject to the provisions of the Act,

> "to charge or receive any greater compensation in the aggregate for the transportation of passengers, or like kind of property, for a shorter distance than for a longer distance **over the same line or road in the same direction,** the shorter being included in the longer distance,"

while Section 3173 of the Missouri Law makes it unlawful to

> "directly or indirectly charge or collect for the transportation of goods, merchandise or property on its said road **for any distance** any larger or greater amount as toll or compensation than is charged or collected for the transportation of similar quantities of the same class of goods, merchandise or property **over a greater distance upon the same road.**"

And this without regard to the circumstances or conditions under which the transportation is made.

In the stipulation which was filed in the case now before the Court it is stated that:

> "It is further agreed that the trains in which the defendant hauled said cars of coal contained

other cars and shipments consigned from points within this State to points without the State, from points without the same to points within this State, and from points without this State, through this State, and to points in other states" (Rec., p. 34).

The Court will take judicial notice that plaintiff in error was engaged in interstate commerce.

The same hauls, therefore, in which plaintiff's coal was transported involved interstate hauls, and on such interstate hauls from Myrick, Missouri, for example, to a point in the State of Kansas, the interstate shipper was charged and paid the same rate on the portion of the haul from Myrick to Independence, Missouri, that the consignee of the McGirew Coal Company paid on its haul from Myrick to Independence en route to its final destination.

Section 3173 of the Revised Statutes of Missouri, regulating the charges for these hauls, does not purport to be confined to transportation wholly within the State of Missouri, but its prohibitions are directed against any railroad corporation which, in the State, "shall, directly or indirectly, charge or collect for the transportation of goods, merchandise or property on its road **for any distance** any larger or greater amount as toll or compensation than is charged or collected for the transportation of similar quantities of the same class of goods, merchandise or property over a greater distance upon the same road, etc."

This Court said in the case of

Wilmington Transportation Company v. Railroad Commission, 236 U. S., l. c. 155:

"It was by the application of these principles that it was decided that a State could not prescribe rates for interstate railroad transportation, even with respect to that portion of the route which was within its own territory. As was said by Mr. Justice Miller in delivering the opinion of the Court upon this question (Wabash Railway v. Illinois, 118 U. S. 557-577), after recognizing the authority of the State to prescribe intrastate rates: 'But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said.' And the same conclusion has been reached with respect to the fixing of rates for railroad transportation which, while beginning and ending in the same State, passes through the territory of another State. The regulation of such rates cannot be split up according to the jurisdiction of the

respective States over the track. There must be one rate fixed by one authority."

When this Court holds, as it did in the **Kirby case** (Kirby v. C. & A. R. R., 225 U. S. 155), that any unreasonable preference accorded to a shipper amounted to a discrimination under the Act to Regulate Commerce, it is difficult to see how the recurrent recoveries of large damages by the defendant in error, under the Missouri statute—which applies equally to intrastate and interstate shipments—would not constitute a flagrant violation of the Act to Regulate Commerce in thus awarding the defendant in error unreasonable discriminations, concessions and preferences not received by its competitors, or other shippers.

The Court said, in

L. & N. R. R. Co. v. Eubank, 184 U. S. 33:

"We have already held in the case of L. & N. R. R. Co. v. Kentucky, 183 U. S. 503, that the section of the Kentucky Constitution above set forth, as applied to places, all of which are within the State, violates no provision of the Federal Constitution. The effect of the decision of the State Court now under review is to hold that the provision of Section 218 of the State Constitution is not confined to a case where the long and short hauls are both within the State of Kentucky, but that it extends to and embraces a long haul from a place outside of to one within the State, and a

shorter haul between points on the same line and in the same direction, both of which are within the State, and the question is whether the provision of that Constitution as thus construed is or is not a violation of the commerce clause of the Constitution of the United States. * * * We fully recognize the rule that the effect of a State constitutional provision or of any State legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the State to a point within it, or from a point within to a point without the State, interstate commerce is thereby affected and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important and not a mere incident.

"Although not exactly in point, yet the case of Wabash, St. Louis, Etc., Ry. v. Illinois, 118 U. S. 557, is somewhat analogous in principle."

After a discussion of the facts in the Eubank case, the Court further said (page 41):

"The facts in this case have been thus fully referred to for the purpose of showing how directly, and also how injuriously, such a provision might affect interstate commerce. Other cases may be supposed where the effect might not be so oppressive, but the fact which vitiates the provision is that it compels the carrier to regulate,

adjust or fix the interstate rates with some reference, at least, to his rates within the State, thus enabling the State, by constitutional provision or by legislation, to directly affect, and in that way to regulate to some extent interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress."

II.

Section 3173 of the Revised Statutes of Missouri, 1909, and the enforcement of the provisions of said section, and section 12, Article XII, of the Missouri Constitution, deprive plaintiff in error of its property without due process of law, and deny to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

International Coal Co. v. R. R., 230 U. S. 184;
Smyth v. Ames, 169 U. S. 466;
Lehigh Valley R. R. v. American Hay Co., 219 Federal Reporter 541;
C., M. & St. P. R. R. v. Minnesota, 134 U. S. 418.

III.

A recovery was allowed in this case without any proof of pecuniary loss on part of defendant in error, although the statute on which the suit was based gives a right of recovery only to the party aggrieved.

The petition in the cause, as hereinbefore stated,

alleged that the Coal Company was damaged and aggrieved by reason of the alleged illegal freight charge and judgment was prayed for the amount of said damages, together with the penalty provided by the statute. When a case between the same parties was before this Court (244 U. S. 191), the Court intimated that a shipper injured by a violation of the constitutional provision, had a right to recover "any overcharge paid by him", but the trial court and the State Supreme Court in the present case allowed a recovery, although it was apparent from the stipulation in the record that the Coal Company had not paid the freight charges.

Section 12 of Article XII of the Missouri Constitution does not declare a right of action. It is in the nature of a prohibition, and it is declared that "suitable laws shall be passed by the General Assembly to enforce this provision".

The statute on which the petition is predicated was enacted in 1872, prior to the adoption of the Constitution, 1875, in which section 12 is found, and there was no proof offered in the case showing wherein the Coal Company (defendant in error) had sustained any damages, but the Court proceeded upon the theory that the mere fact that a rate was charged the Coal Company for the transportation of a commodity between two given points, and a different rate charged some other shipper for the transportation of

like commodities between two other points of less distance, entitled defendant in error to a recovery without regard to the circumstances or the competitive conditions incident to the transportation, and without any proof as to the pecuniary loss sustained by the Coal Company. In its construction of the long-and-short-haul clause of the Interstate Commerce Act, the Interstate Commerce Commission has invariably required that there be proof of pecuniary damage to justify an award of reparation.

In

Oregon Fruit Co. v. S. P. Co., Vol. 50, I. C. C. Reports, p. 722,

the Commission said:

> "It has frequently been held that nothing in the Act to Regulate Commerce warrants a presumption of damage. The distinction is plain between the carrier's unlawful act, which might render it liable to prosecution, and the shipper's right to damages for the injury, if any, occasioned thereby. In the absence of proof of damage to the shipper the fact that carriers have charged or received rates which violate the long and-short-haul rule of the fourth section of the act is not of itself a sufficient basis for an award of reparation (Penn. R. R. Co. v. International Coal Co., 230 U. S. 184; Nix & Co. v. S. Ry. Co., 31 I. C. C. 145, 149; Chattanooga Implement and Mfg. Co. v. L. & N. R. R. Co., 40 I. C. C. 146; LaCrosse Shippers Ass'n v. C. I. & L. Ry. Co.,

43 I. C. C. 520, 524; United States Glue Co. v. C. & N. W. Ry. Co., docket No. 6832, unreported)."

In the Nix case the Commission said:

"The mere fact that the rates charged were maintained in violation of the fourth section of the act, while it may make the carrier subject to a prosecution under the act for the recovery by the Government of the penalties prescribed for the violation thereof, does not, in the absence of proof of damage to the shipper, afford a basis for an award or reparation in his favor."

In the case of

Sharpless v. Lawrence, 213 Fed. Rep. 427,

the Court said:

"The word 'damage' as a word of art has a clear and definite legal meaning. It is defined by Bouvier to be 'the indemnity recoverable by a person who has sustained an injury, either in his person, property or relative rights, through the act or default of another'. The word has also been defined as 'a sum of money adjudicated to be paid by some person to another as a compensation for loss sustained by the latter in consequence of an injury committed by the former'. These and other definitions given by the courts, though in varying language, include the concept of indemnity or compensation for actual loss. It is a legal term of clear import, and an unneces-

sary and harmful confusion of thought would ensue from treating it otherwise. In the recent case of Penn. R. R. v. International Coal Co., 230 U. S. 184, the Supreme Court of the United States, in dealing with the eighth section of the Act to Regulate Commerce, giving a right of action to a shipper injured by an act of a common carrier prohibited by the statute and making 'such common carrier * * * liable to the person injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of the act', used this significant language: 'The statute gives a right of action for damages to the injured party, and by the use of these legal terms clearly indicates that the damages recoverable were those known to the law and intended as compensation for the injury sustained'. We are of the opinion, therefore, that this Court, in affirming the decree of the court below, 'that the complainant recover of defendant the damages sustained by said complainant from the unlawful acts of the defendant herein adjudged' did not and could not do otherwise than impute to the words 'damages sustained by said complainant' the legal meaning attaching thereto as above indicated."

Wade, District Judge, in

Homestead Company v. Electric Company, 226 Fed. 53,

said:

"As a general proposition, I do not think that the difference in rates is the measure of damages.

I think a great deal of confusion has arisen by failing to keep in mind the real basis of the cause of action for damages. The injured person was not injured by reason of the higher rate charged to him, it being conceded that such rate was reasonable. If he has been damaged it is because of the lower rate charged his competitor, and, this being true, the difference between such lower rate and the higher rate charged a competitor cannot always measure the loss actually sustained as a direct result of the discrimination.

"In this case plaintiff was engaged in 'printing a weekly newspaper and doing a job printing and electrotyping business'. Its competitor was engaged in 'running a newspaper and job printing plant in said city under like conditions'. Suppose that each was running a weekly newspaper, differing in politics and policies. Each would have its own circle of subscribers and readers. While in a sense the parties would be competitors, yet they are not competitors in such a sense as that the difference in the rate charged for electricity would be the true measure of damages arising out of the fact that one received a lower rate than the other. If the other party was entitled to a lower rate, as a matter of law, then, of course, the difference between that and the higher rate would be the true measure; but, when the damages to be recovered must be the direct and proximate result of the lower rate, it must follow that the difference in rate is not the true test as applied to such case.

"The Supreme Court of the United States, in

Pennsylvania Company v. Coal Co., 230 U. S. 184, fully reviews all the authorities, and upon this matter of damages says: 'But it does not at all follow that the amount of injury suffered is the difference in the rates charged. It might be or it might not be; but, in any event, it must be the subject of proof.'"

The United States Circuit Court of Appeals said, in

Lehigh Valley R. R. Co. v. American Hay Co., 219 Fed. Rep. 541:

"Finally it is contended that in an action under section 16 of the act there must be proof of damages sustained, and that such proof is lacking here.

"As a matter of first impression, it would seem that when one shipper is made to pay a railroad, through discrimination either in rebates or in charges for special services, a definitely ascertained larger sum than his competitors are charged for transportation of goods, he is damaged to that amount, or at least there is a prima facie showing of damages sustained by himself. Two decisions of the Court of Appeals for the Third Circuit are to the contrary of this proposition (Lehigh Valley Railroad v. Clark, 207 Fed. 717, 125 C. C. A. 235; Lehigh Valley Railroad v. Meeker, 211 Fed. 785, 128 C. C. A. 311), and it seems to us that the decision of the Supreme Court in Pennsylvania Railroad v. International Coal Co., 230 U. S. 184, 33 Sup. Ct. 893, L. Ed. 1446, requires the same conclusion. In

that case by means of rebates given to others and refused to itself the shipper has been charged for transportation a greater sum than was collected from its competitors. The amount of the excess was determined and the fact that it was paid to the railroad was proved. The Court said: 'But the plaintiff may have sold at the usual profit all or part of its 40,000 tons at the regular market price; the purchaser, on his own account, paying freight to the point of delivery. In that event, not the shipper, but the purchaser, who paid the freight, would have been the person injured, if any damage resulted from giving rebates.'

"The facts in the case at bar seem to us indistinguishable from those in the case last cited. It is not enough to show that the American Hay Company paid the railroad these various items of $2.00; for aught that appears the persons to whom it sold may have themselves paid all those charges, or some of them, or some part of each charge. Just how the initial payment of each $2.00 resulted in damages to the company, if it were damaged, is a matter wholly within the knowledge of the hay company, and not presumably within the knowledge of the railroad company. Proof that damages did result from the initial payment is part of the plaintiff's case, and, without affirmative proof to show such damages, it was not entitled to a verdict.

"The judgment is reversed."

The decision of this Court in the case of

Southern Pac. Co. v. Darnell-Taenzer Co., 245 U. S. 531,

does not justify the construction placed upon it by the Missouri Supreme Court. This Court there said:

> "But here the plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss (Meeker v. L. V. R. R. Co., 236 U. S. 429; Mills v. L. V. R. R. Co., 238 U. S. 473)."

In the case at bar plaintiff did not pay the freight, but, by arrangement, instead of quoting a price on board of cars at Myrick (shipping point), quoted a price delivered to the consignees' stations, which quotation was based on the price at Myrick, plus the freight rate charged by the Railroad Company, and it is distinctly stated in the stipulation of facts:

> "When the coal was received by the consignees **such consignee paid defendant's agent the freight charges** and forwarded the receipted freight bill to the plaintiff to be credited on the price of said coal as part payment therefor and then such consignee paid the plaintiff the difference between such freight bill and the quotation price" (Rec., p. 34).

It is evident, therefore, that this is a case where a plaintiff is suing under a statute which authorizes

a right of action in favor of the party aggrieved and for the damage alleged to have been sustained by him, when the facts proven show that he sustained no damage whatever, and to require a railroad company to pay damages under such circumstances is the taking of its property without due process of law.

IV.

The reported decisions of the Missouri Supreme Court indicate that defendant in error is the only litigant who has sought to enforce the provisions of Sections 3173 and 3211, Revised Statutes of Missouri, 1909, and the provision of the Missouri Constitution on which the Supreme Court of that State based its decision. In this connection we call the Court's attention to the differences of opinion which have marked the decisions of these McGrew cases in the Supreme Court of Missouri.

The case reported in the 230th Missouri, 625, was one in which six Judges were equally divided in opinion, a Special Judge being selected, in pursuance of Missouri procedure, who delivered the opinion of the Court. Three of the Judges, Woodson, Burgess and Fox, Chief Justice, dissenting.

The present case (Rec., p. 46) was likewise decided by the vote of four Judges; Goode and Woodson, dissenting; Graves, Judge, marked as not sitting.

The opinion of Judge Graves, however, relative to the subject matter of this litigation is indicated in his separate concurring opinion in case of

Missouri Southern R. R. Co. v. Public Service Commission, 214 S. W. Reporter, 381,

decided by the Missouri Supreme Court, July 9, 1919, wherein the Judge said:

> "Our learned brother says that the Public Service Commission based its finding upon the fact that the rate charged violated Section 12 of Article XII of the State Constitution, as said provision of the Constitution has been construed by this Court in the several McGrew cases. As a Judge I have never sat in any of the McGrew cases. I was at one time of counsel in the second of those cases, although on this bench when it came here. For that reason I have never participated in any of those cases. As a lawyer, I was never able to bring my mind to the Court's logic or law in those cases. Nor do I agree to them now. However, the last of the line of the McGrew cases decided here was taken to the United States Supreme Court and that Court has placed its stamp of approval on the judgment of my brothers, and I feel constrained now to yield to the construction given in those cases.
>
> "I am not convinced of the logic of those cases, but the rule is now settled by the highest arbiter and I yield. With this explanation, I concur in the opinions."

The Public Service Commission of the State of Missouri has jurisdiction of the regulation of railroad rates and charges in said State, and when an application was presented to that body by the plaintiff in error in this case (Vol. IV, P. S. C. Reports, l. c. 8) for the purpose of filing tariffs to bring the rates on coal within the State of Missouri into compliance with the decisions of the Court in the Metirew cases, the Commission declined to permit the mileage schedule of rates to be applied, and in its opinion said:

> "It has been found in actual practice that a mileage schedule of rates on coal cannot be successfully applied, but that the so-called blanket or zone system must be used. At the hearing this fact was admitted to be true by all parties in interest. The location of coal mines is not subject to the desire of the owner, and cannot be provided with reference to geographical advantages as compared to the market, but they are where nature has located them. Supplying a market like Kansas City, possibly one of the largest in the West, it is found that coal is produced at various distances, and, generally speaking, in all directions. If the closest mine to Kansas City is located some 40 miles distant and in Kansas, while another mine is located on another road some 52 miles distant in Missouri, it naturally follows that the supplying of the market will be met with coal from the closest mine if a mileage schedule of rates is adopted, and it would mean that the line handling the coal from the

Missouri mine would be deprived of the revenue produced by the handling of that traffic, unless it met the rate of the Kansas Company."

The observations of the dissenting Judges in case reported in 230th Missouri (Rec., p. 92), are to the same effect:

"By again consulting the geography of the country it will clearly appear that the Joplin coal rates complained of were made in competition with the coal and coke rates from the Pittsburg and Cherokee District of Kansas; and if our statute which provides that no less charge shall be made for a longer than a shorter haul were to prevail, as contended for by counsel for plaintiff, it would mean in many cases that the industries in other States and foreign transportation companies would thrive and wax fat at the expense of Missouri industries and carriers.

"The close proximity of the Cherokee and Pittsburg coal district of Kansas to Joplin and neighboring Missouri towns is such that the Missouri coal mines could not market their products in any such town if it were not for said reduced rates, or if the long-and-short-haul clause of the statute, as understood by some of my associates, was enforced. So long as no one in Missouri is injured our industries should certainly be enabled to do business even in all competitive towns and cities of this State as against outsiders, which clearly they could not do if the construction

placed upon our statutes by counsel for plaintiff is correct.

"We know from the common knowledge that the cost of mining coal in this State far exceeds the cost of mining it in the State of Illinois, and if Missouri coal mines are not given reduced rates to Boonville and other competing points, Illinois coal will surely supply their needs."

We respectfully submit that the contention of plaintiff in error that Section 12 of Article XII of the Constitution of Missouri is in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, and that it is also in violation of Section 8 of Article I of the Federal Constitution, is substantial and meritorious; that this Court, therefore, has jurisdiction of the cause; and on the merits of the case it is clear that although the Coal Company instituted its suit under a statute which only authorized a recovery in behalf of a party aggrieved or damaged, it obtained a judgment for more than $14,000.00 without proof of any pecuniary loss or damage, and we ask that judgment in the cause be reversed.

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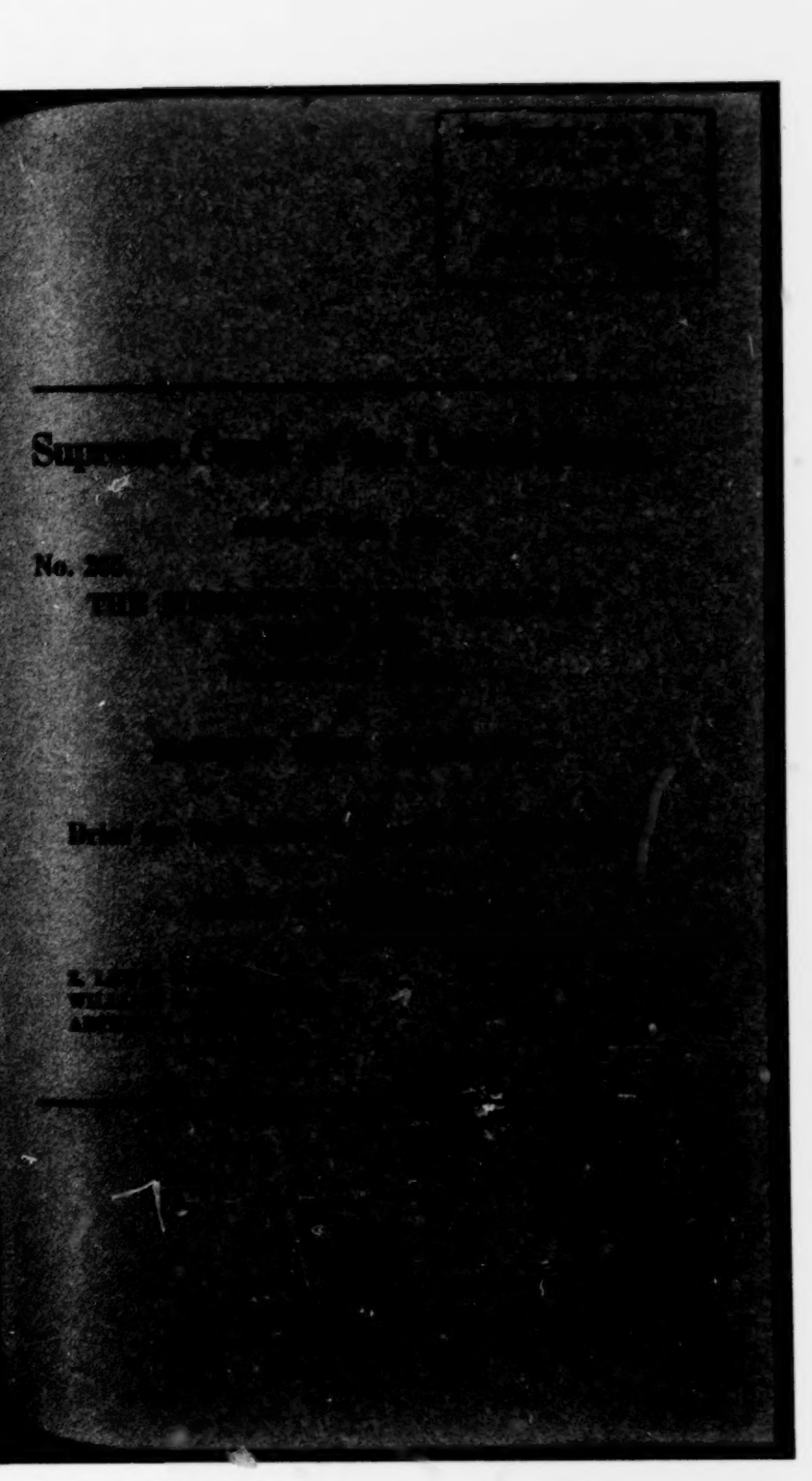
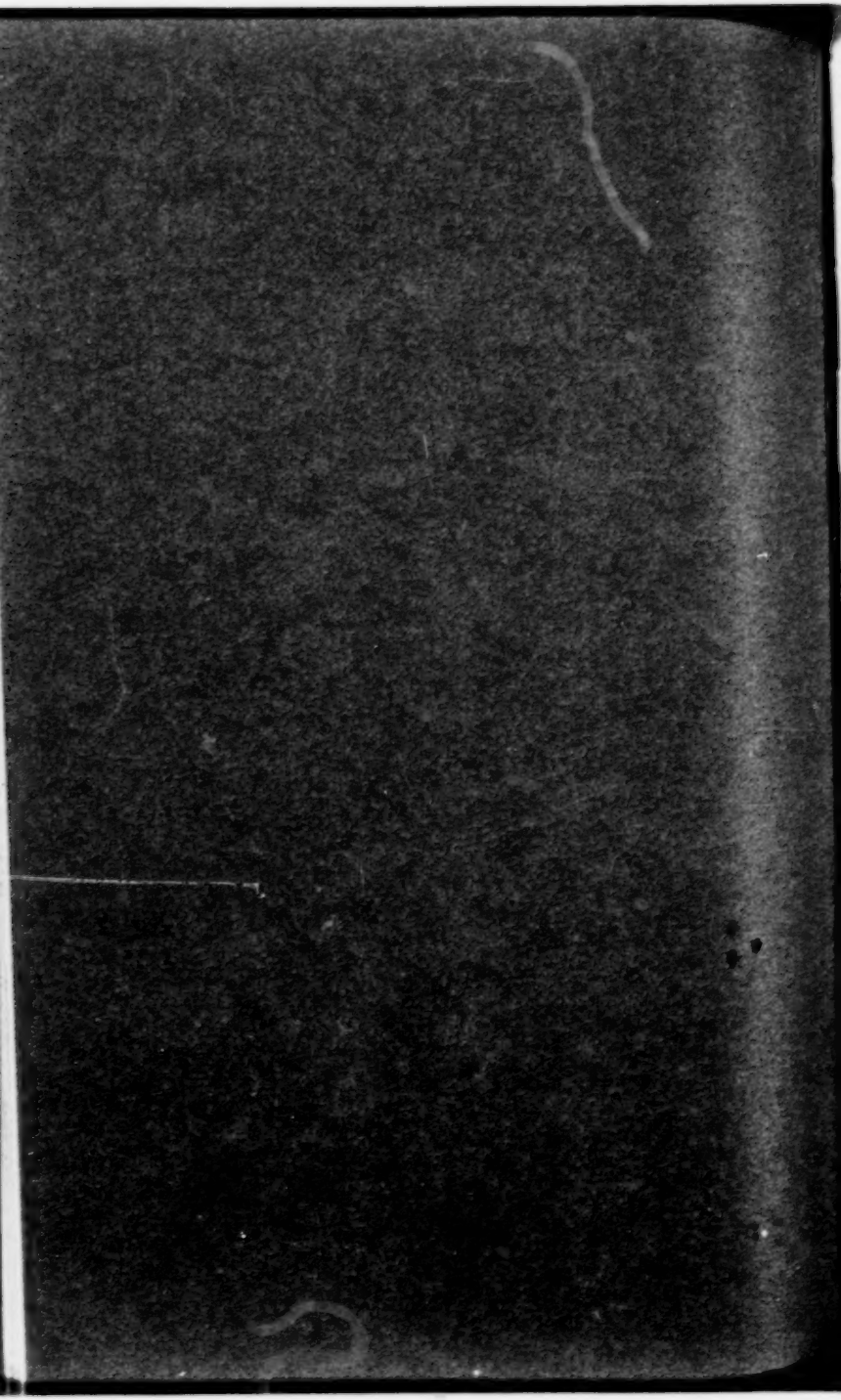
Attorney for Plaintiff in Error.

HARVEY C. CLARK,
EDWARD J. WHITE,
Of Counsel





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Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 265.

THE MISSOURI PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,
v.
McGREW COAL COMPANY.

Brief for Defendant in Error on the Merits.

This case has produced a number of briefs which may be thus enumerated:

I. Brief by defendant in error on motion to vacate supersedeas.

II. Brief by plaintiff in error in opposition to motion to vacate supersedeas.

III. Brief by defendant in error on motion to dismiss or affirm, or place on summary docket.

IV. Brief of plaintiff in error in opposition to motion just stated.

V. Brief of plaintiff in error on the merits.

VI. Separate, supplemental brief of plaintiff in error on the merits.

VII. The present brief, that of defendant in error, on the merits.

FACTS.

By section 1 of An Act of the Legislature of Missouri, approved April 1, 1872 (Laws of Missouri, 1871-1872, p. 69), it was provided: "No railroad corporation

organized or doing business in this State, under any act of incorporation or general laws of this State now in force, or which may be hereafter enacted, shall directly or indirectly charge or collect, for the transportation of goods, merchandise, or property on its said road for any distance, any larger or greater amount, as toll or compensation, than is at the same (time) charged or collected for the transportation of similar quantities of the same class of goods, merchandise or property, over a greater distance upon the same road, nor shall such corporation charge different rates for receiving, handling or delivering freight at different points on its road, or roads connected therewith, which it has a right to use, nor shall any such railroad corporation charge or collect, for the transportation of goods, merchandise or property over any portion of its road, a greater amount as toll or compensation than shall be charged or collected by it for the transportation of similar quantities of the same class of goods, merchandise or property over any other portion of its road of equal distance, and all such rules, regulations or by-laws of any railroad corporation as fix, prescribe or establish any greater toll or compensation than is hereinbefore described, are hereby declared to be void."

The title of the Act cited is: "An Act to Prevent Unjust Discrimination and Extortion in the Rates to be Charged by the Different Railroads in this State, for the Transportation of Freight on said Roads."

By art. XII, sec. 12, Constitution of Missouri, 1875, it is provided: "It shall not be lawful in this state for any railway company to charge for freight or passengers a greater amount for the transportation of the

same, for a less distance than the amount charged for any greater distance; and suitable laws shall be passed by the general assembly to enforce this provision; but excursion and commutation tickets may be issued at special rates."

The Missouri Pacific Railway Company operates a railroad in Missouri. McGrew Coal Company shipped coal over that road. The first count of the petition (typical of the 52 counts on which it is based) pleads that the carrier hauled coal from Myrick (the point of shipment by McGrew Coal Company) to Blackwater, a distance of 60.62 miles, at 65 cents per ton; and at the same time hauled coal on its road from Waverly to Kansas City (for other shippers), a distance of 63.84 miles (a greater distance), at 40 cents (a lesser sum) per ton (Rec. pp. 13, 14). The case was tried on a stipulation admitting this as a fact (Rec. p. 25).

The stipulation also admits:

> "It is further stipulated that in this case the plaintiff in quoting the price of said coal to the several consignees named in the exhibits herein, instead of quoting f. o. b. at Myrick, quoted a price delivered to the consignees' stations which quotation was based upon the price at Myrick plus the freight rate charged by the defendant; when the coal was received by the consignee such consignee paid defendant's agent the freight charges and forwarded the receipted freight bill to the plaintiff to be credited on the price of said coal as part payment therefor and then such consignee paid the plaintiff the difference between such freight bill and the quotation price.
>
> "It is further stipulated that such coal was de-

livered by the plaintiff to the defendant for shipment in the usual and ordinary way without any direction or request by plaintiff as to what particular trains the same must be transported in and that the defendant received and transported the same in the usual ordinary course of business, on the usual train passing over defendants' road.

"It is further agreed that the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this state to points without the same, from points without the same to points within this state and from points from without this state through this state to points in other states" (Rec. pp. 25, 26).

No other evidence was introduced.

The shipper recovered judgment for the difference between the rate charged on the shipments made by it and the lesser rate the carrier charged other shippers for shipments carried a greater distance. Hence, the pending writ of error. Other incidents of the case will be adverted to in the course of the brief.

McGrew Coal Company is a corporation and has succeeded to a business established by James C. McGrew, now deceased. In *McGrew* v. *Mo. Pac. Ry. Co.*, 177 Mo. 533, it was ruled that the Act hereinbefore cited is not in conflict with the Missouri Constitution of 1875, and had not been repealed. On a retrial of that case, plaintiff recovered. Judgment affirmed (118 Mo. App. 379).

In a subsequent case it was ruled:

(*a*) The Act of 1872 is valid and the subject thereof fully embraced within its title.

(*b*) The Act of 1872 has not been repealed.

(*c*) The constitutional provision of 1875 is self-enforcing and of itself creates a cause of action, independent of the statute of 1872.

(*d*) Neither the Act of 1872 nor the constitutional provision of 1875 are in conflict with the Federal Constitution.

(*e*) The measure of damages for a violation of the constitutional self-enforcing provision (independent of the statute) is the difference between the greater rate charged for the lesser distance and the lesser rate charged for the greater distance.

McGrew v. *Mo. Pac. Ry. Co.*, 230 Mo. 496.

The cases cited were followed:

McGrew v. *Mo. Pac. Ry. Co.*, 258 Mo. 23.
McGrew Coal Co. v. *Mo. Pac. Ry. Co.* (Mo. Sup.), 178 S.W. 1179.

The last-named case reached this Court on writ of error. Judgment affirmed.

Mo. Pac. Ry. Co. v. *McGrew Coal Co.*, 244 U.S. 191.

Then came the case at bar.

McGrew Coal Co. v. *Mo. Pac. Ry. Co.* (Mo. Sup.), 217 S.W. 984.

The case at bar differs from its predecessors only in one particular: In the case at bar, the coal was sold f.o.b. destination. The purchaser paid the excessive freight and was given credit for the freight paid in

settling with the shipper for the purchase price of the coal thus shipped.

I.

THE FIRST POINT MADE BY THE PLAINTIFF IN ERROR, PREDICATED OF THE DEFENSE OF INTERSTATE COMMERCE, IS NOT WELL TAKEN.

The point—

(a) Was not properly raised in the trial Court;

(b) Nor decided by the State Supreme Court;

(c) Nor assigned for error in the assignment of errors in this Court;

(d) Is not reviewable on writ of error;

(e) Is disposed of in Mo. Pac. Ry. Co. v. McGrew Coal Co., 244 U.S. 191, 200.

(f) A common carrier receiving for shipment a car over its line entirely in a State, between intrastate points, cannot convert the shipment into interstate commerce by placing the car in a train containing other cars engaged in interstate commerce.

(g) No evidence was introduced showing that the State regulation of local commerce directly affected interstate commerce.

On the pending writ of error, the plaintiff in error attempts to raise a contention with respect to the Interstate Commerce Clause of the Federal Constitution (Brief IV, pp. 11-22; V, pp. 16-24; VI, pp. 1-27).

(*a*) *The question of interstate commerce was not properly raised in the trial Court.*

Inasmuch as the recovery by defendant in error in the case at bar is based on a self-enforcing constitu-

tional provision, it becomes unnecessary to consider the statute which plaintiff in error claims to violate the Federal Constitution (244 U.S. 199).

The constitutional provision (Missouri Constitution, art. XII, sec. 12, hereinbefore set out, *ante*, pp. 2, 3) does not by its terms purport to govern interstate commerce. Nor has it been so construed by the State Court (*McGrew* cases, *ante*, p. 5). The record discloses (p. 13) one count of plaintiff's petition, based on a shipment between two points in Missouri, compared with a lesser rate for a greater distance between two points in Missouri. There is no evidence in the record that any of the shipments made by the plaintiff were between interstate points, nor that plaintiff's recovery is based on a comparison with interstate rates. Defendant carrier in the trial Court filed an answer setting up a number of special defenses (Rec. pp. 14-16). The only reference to the Interstate Commerce Clause of the Federal Constitution is found in the last two paragraphs of this answer (Rec. p. 16). Plaintiff shipper demurred to portions of the answer specifically set out in the demurrer (Rec. pp. 17, 18).

Plaintiff shipper did not demur to, nor move to strike out, that portion of defendant carrier's answer predicated of the defense of interstate commerce, but instead filed a reply thereto (Rec. p. 19). So the statement that: "One of the paragraphs of the railway company's answer which was stricken out in the trial court was as follows" (see Brief No. IV, p. 12; No. V, p. 18), is inaccurate.

On the trial of the case it was stipulated that the coal in question "was delivered by the plaintiff to the defendant for shipment in the usual and ordinary way

without any direction or request by plaintiff as to what particular trains the same must be transported in and that the defendant received and transported the same in the usual ordinary course of business, on the usual train passing over defendant's road; . . . that the trains in which defendant hauled said cars of coal contained *other cars and shipments* consigned from points within this state to points without the same, from points without the same to points within this state and from points from without this state through this state to points in other states" (Rec. pp. 25, 26).

This is all that the record discloses as to the facts of the interstate commerce phase of the case. The carrier, in the trial Court (the judge thereof sitting as a jury), unsuccessfully asked the Court at the close of the plaintiff's evidence, to sustain a demurrer thereto, offered no evidence in defense, and then asked three declarations of law (Rec. p. 26). Only one of these referred to the Federal Constitution, and this declaration did not mention the Interstate Commerce Clause thereof.

There is no evidence in the record bearing on the contention of plaintiff in error (Brief No. IV, p. 18) that "on such interstate hauls from Myrick, Missouri, for example, to a point in Kansas, the interstate shipper was charged and paid the same rate on the portion of the haul from Myrick to Independence, Missouri, that the consignee of McGrew Coal Company paid on its haul from Myrick to Independence en route to its final destination." The only count of plaintiff's petition before this Court is the first count thereof (Rec. p. 13). Independence, Missouri, has nothing to do with that count. Coal was not hauled from Myrick to

Independence for the consignee of McGrew Coal Company, but from Myrick to Blackwater, *in the opposite direction.* (This on the assumption this Court takes judicial notice of defendant's line of railway and the points thereon; otherwise the contentions of plaintiff in error are wholly unintelligible.) There is no evidence as to what the carrier charged the interstate shipper, nor that the intrastate rate in any way affected the interstate rate.

Reference is made by plaintiff in error (Brief IV, p. 18) to the second count of plaintiff's petition. This count is not set out in full in the record in this case. It is referred to as follows (Rec. p. 14): ". . . in the second count the shipment was from Myrick to Booneville, in Cooper County, on the Lexington Branch, a distance of 76.71 miles where the rate charged was sixty-five cents per ton, and comparison is made with the rate charged by the defendant on like shipments on its road from Liberal in Barton County to Granby in Newton County, a distance of 77.14 miles, where the rate charged was fifty cents per ton." There is no evidence that the comparative lesser rate for a greater distance was an interstate rate. Liberal and Granby are both in Missouri. At the hearing of *Missouri Pacific Railway Company* v. *McGrew*, 244 U.S. 191, the carrier filed a brief in which is set out a map not contained in the record either in that or in this case. That map discloses that Missouri Pacific Railway Company has a line of railroad from Liberal to Granby, Missouri, entirely in Missouri; also a line from Liberal, Missouri, to Pittsburg, Kansas, and then (so the map states) the carrier has trackage rights from Pittsburg, Kansas, over another railroad, to a point in Missouri, and

thence to Granby, Missouri. But this Court in that case paid no attention to the map.

". . . on appeal or writ of error to this court, papers or documents used at the hearing in the court below cannot in strictness be examined here unless they are made part of the record by bill of exceptions or in some other proper mode."

Bassing v. *Cady*, 208 U.S. 386, 389.
Metropolitan Railroad Co. v. *District of Columbia*, 195 U.S. 322, 329.
United States, ex rel., v. *United States &c. Co.*, 222 U.S. 283.
1 Digest U.S. Sup. Ct. Reports (Law. Co-op. Pub. Co.), p. 509.

"It has been repeatedly ruled in this court, that we can look only to the record to ascertain what was decided in the court below."

Davis v. *Packard*, 7 Peters, 276, 282.
Red River Cattle Co. v. *Sully*, 144 U.S. 209.
Claasen v. *United States*, 140 U.S. 140, 148.

The finding in a case tried before a judge sitting as a jury, no declarations of law having been asked or given, will not be disturbed if there be evidence to support it.

Hatton v. *St. Louis*, 264 Mo. 634, 646.
Dolphin v. *Klann*, 246 Mo. 477, 485.
Home Savings Bank v. *Fiske*, 135 Mo. App. 8, 10.
Walker v. *Modern Woodmen of America*, 190 Mo. App. 355, 357.

American Metal Co. v. *Daugherty*, 204 Mo. 71, 75, 76.

Millinery Co. v. *Railroad*, 177 Mo. App. 282, 283, 284.

Greisser v. *Emmons*, 178 Mo. App. 28, 29, 30.

Brix v. *Fidelity Company*, 171 Mo. App. 518, 524.

Glencoe &c. Co. v. *Clore*, 170 Mo. App. 675, 680.

Scarritt Estate Co. v. *Casualty Co.*, 166 Mo. App. 567, 570.

Hanenkratt v. *Brougham*, 164 Mo. App. 108, 110.

Maxwell v. *Harroun* (Mo. App.), 180 S.W. 993.

Chrisman v. *Scholl*, 177 Mo. App. 58.

Miller v. *Pepperling*, 185 Mo. App. 222, 228.

Bank v. *Phillips*, 179 Mo. App. 488, 494.

Winfrey v. *Matthews*, 174 Mo. App. 713.

"If plaintiff grounds his right of action on a statute which defendant contends is unconstitutional it [the contention] should be put in the answer *and kept alive.*"

Lohmeyer v. *Cordage Co.*, 214 Mo. 685, 690.

A point not raised in the trial Court cannot be considered on appeal.

Baker v. *J. W. McMurry Contr. Co.* (Mo.), 223 S.W. 45, 52.

In *Heller* v. *Chicago & A. R. Co.* (Mo. App.), 209

S.W. 567, defendant contended on appeal that plaintiffs were seeking to apply a State law to an interstate commerce shipment; held, not properly raised in the trial Court.

See *Riley &c. Co.* v. *Symmonds*, 195 Mo. App. 111, 118.
Swanson v. *Bradshaw* (Mo. App.), 187 S.W. 268.
Carradine v. *Ford*, 195 Mo. App. 684, 703, 704, 706.

In *Sheets* v. *Insurance Co.*, 226 Mo. 613, 619, it was ruled that a defendant cannot raise a constitutional question by simply excepting to the giving of an instruction based on a statute claimed to be unconstitutional.

Where plaintiff offered a special law in evidence and it was admitted without objection as to its constitutionality, held such point not open to defendant on appeal.

Shelton v. *Franklin*, 224 Mo. 342, 354.

A constitutional question raised for the first time in a motion for a new trial, held too late.

Hartzler v. *Met. St. Ry. Co.*, 218 Mo. 562.
Pickel v. *Pickel*, 243 Mo. 641, 666.

A constitutional question raised for the first time in an intermediate trial Court on appeal from a Probate Court, held too late.

State, ex rel., v. *McQuillin*, 246 Mo. 586.

(b) The question was not raised in, nor passed on by, the State Supreme Court.

The opinion of the Supreme Court of Missouri, neither in the case at bar (Rec. pp. 38-42) nor in any of the cases of which the opinion in this case is predicated, passed on the question of interstate commerce. The briefs of Missouri Pacific Railway Company filed in that Court in this case (prior to the motion for rehearing) are silent on that issue.

A Federal question, not raised in the trial Court, will not be considered by the Appellate Court.

Taber v. *Mo. Pac. Ry. Co.* (Mo.), 186 S.W. 688; writ of error dismissed, 244 U.S. 200.

An appellant, to take advantage of an error in the trial Court, must assign error in the Appellate Court.

St. Charles Savings Bank v. *Denker*, 275 Mo. 607, 620, 621.
Vahldick v. *Vahldick*, 264 Mo. 529.
Ross v. *Bewley* (Mo.), 178 S.W. 495.

A constitutional question not raised in appellant's brief, treated as waived or abandoned.

State, ex rel., v. *Drainage District*, 269 Mo. 444, 455.
State, ex rel., v. *Carothers* (Mo.), 214 S.W. 857, 858.

Likewise as to other questions:

Hughes v. *Winkelman*, 243 Mo. 81, 89.

An assignment of error in a motion for a new trial and in a brief that the judgment is in conflict with the

Interstate Commerce Act, without stating the particulars of the conflict, is not sufficiently specific to raise a Federal question.

Eccles v. *Mo. Pac. Ry. Co.*, 170 Mo. 432.

A Federal question which under the State practice was not properly raised, hence not considered by the State Appellate Court, is not reviewable in this Court.

Barbour v. *Georgia*, 249 U.S. 454, 460.
Hartford Life Ins. Co. v. *Johnson*, 249 U.S. 490.

A constitutional question not presented by assignment of errors or otherwise, or passed upon by the State Supreme Court, will not be considered in this Court.

Hiawassee Power Co. v. *Carolina-Tenn. Co.*, 252 U.S. 341.

Where the Federal question was not raised in the trial Court, and for that reason not passed on by the State Appellate Court, the writ of error was dismissed for want of jurisdiction.

Erie R.R. Co. v. *Purdy*, 185 U.S. 148.

> "To become the basis of a proceeding in error from this court to the Supreme Court of a State 'a right, privilege or immunity' claimed under a statute of the United States must be 'specially set up or claimed,' and must be denied by the state court. Rev. Stats., §709; Judicial Code, §237. This means that the claim must be asserted at the proper time and in the proper manner by pleading,

motion or other appropriate action under the state system of pleading and practice. Mutual Life Insurance Co. v. McGrew, 188 U. S., 291, 308 * * * ."

Atlantic Coast Line R.R. Co. v. *Mims*, 242 U.S. 532, 535.

Mo. Pac. Ry. Co. v. *Taber*, 244 U.S. 200.

Louisville &c. R.R. v. *Woodford*, 234 U.S. 46.

Seaboard Air Line Ry. v. *Duvall*, 225 U.S. 477, 487.

As to the time and manner in which a Federal question is required to be raised in a State Court, in order to be reviewable in this Court, consult 1 U.S. Sup. Ct. Digest (West Pub. Co. 1916), Courts, Key No. 396, p. 791.

St. Louis &c. Ry. Co. v. *Starbird*, 243 U.S. 592.

The attempt to inject the interstate commerce question into the case by filing a motion for rehearing in the State Supreme Court came too late, the Court having overruled the petition without deciding the question.

See cases cited, Brief III, pp. 4, 5.

(c) *The question of interstate commerce is not assigned as error on the pending writ of error* (Rec. pp. 110-113).

See Rule 21 of this Court, sub. 4.

R.S. sec. 997; 6 Fed. Stat. Ann. (2d ed.), pp. 163, 167-169; 3 U.S. Comp. Stat., 1916, Ann., pp. 3280, 3289, *et seq.*

Wood v. *Wilbert*, 226 U.S. 384.
Stevenson v. *Barbour*, 140 U.S. 48.

In *San Antonio &c. Ry. Co.* v. *Wagner*, 241 U.S. 476, 480, plaintiff recovered as an employee engaged in interstate commerce. This Court refused to consider the contention that there was nothing in the record to show that, in fact, plaintiff was engaged in interstate commerce at the time he was injured, such omission not having been assigned as error.

(*d*) *The question of interstate commerce, as applied to the record in the case at bar, is not, under section 237 of the Judicial Code, amended September 6, 1916, reviewable on writ of error, but only, if at all, on certiorari.*

See Brief, No. III, pp. 32-37.

The State Court has not ruled that the State constitutional self-enforcing provision applied to interstate commerce.

The constitutional provision was enacted in 1875. Even if its terms had included interstate commerce, it would not for that reason have been void as to intrastate commerce.

> "The Interstate Commerce Act has no application to intrastate commerce . . . and it follows that state statutes regulating commerce are void only so far as they affect commerce of an interstate nature."
>
> *Hocking Valley R. Co.* v. *New York Coal Co.*, 217 Fed. 727, 735.

State statute held void *as to interstate shipment:*

St. Louis &c. Ry. Co. v. *Edwards,* 227 U.S. 265.

Chicago &c. Ry. Co. v. *Hardwick Elevator Co.,* 226 U.S. 426.

Houston &c. R.R. v. *Mayes,* 201 U.S. 321.

Gulf &c. Ry v. *Hefley,* 158 U.S. 98.

Hall v. *DeCuir,* 95 U.S. 485.

And valid as to intrastate shipment:

Oliver v. *Chicago &c. Ry. Co.,* 89 Ark. 466.

St. Louis &c. R.R. Co. v. *Bilby,* 35 Okla. 589.

Houston &c. Ry. Co. v. *Peters,* 15 Tex. Civ. App. 515.

Reynolds & Craft v. *Railway,* 81 S.C. 383, 387.

Farmers Elevator Co. v. *Great Northern Ry. Co.,* 131 Minn. 152, 158.

And applicable only to an intrastate shipment:

Gulf &c. Ry. Co. v. *Mill & Grain Co.* (Tex. Civ. App.), 162 S.W. 1191.

Trinity &c. Ry. Co. v. *Geppert* (Tex. Civ. App.), 135 S.W. 164.

Chicago &c. Ry. Co. v. *Bruce* (Okla.), 150 Pac. 880.

St. Louis &c. R.R. Co. v. *Wynn* (Okla.), 156 Pac. 346.

Commissioner v. *Wabash R.R. Co.,* 123 Mich. 669.

". . . where two interpretations of a statute are in reason admissible, one of which creates a repug-

nancy to the Constitution and the other avoids such repugnancy, the one which makes the statute harmonize with the Constitution must be adopted."

The Abby Dodge, 233 U.S. 166, 175.
E. R. Darlington Lumber Co. v. *Railroad Co.*, 216 Mo. 658, 671, 672.

It may be conceded that had the Supreme Court of Missouri ruled that the Missouri constitutional provision under discussion in this case applied to interstate shipments:

(1) That ruling would be accepted by this Court as the true interpretation of the meaning of that provision.

Mo. Pac. Ry. v. *Nebraska*, 164 U.S. 403, 414.
Boston Chamber of Commerce v. *Boston*, 217 U.S. 189, 194.
Thornton v. *Duffy*, 41 Sup. Ct. 137.
Alabama &c. Ry. Co. v. *Mississippi R.R. Comm.*, 203 U.S. 496, 501.
American Mfg. Co. v. *St. Louis*, 250 U.S. 459.
Hancock v. *Muskogee*, 250 U.S. 454.

(2) And would be reviewable in this Court on writ of error.

New Orleans &c. R.R. Co. v. *Scarlet*, 249 U.S. 528.
Kenney v. *Supreme Lodge*, 252 U.S. 408.

But the State Court has not so ruled.

The pending writ of error bears date February 10, 1920 (Rec. p. 3). It is respectfully submitted that under section 237 of the Judicial Code, as amended Sep-

tember 6, 1916 (Fed. Stat. Ann. 2d ed. Sup. 1918, pp. 411, 412; 39 Stat. L. 726), the question as to interstate commerce attempted to be raised by the plaintiff in error in this case is a claim of a "title, right, privilege, or immunity . . . under the Constitution of the United States," reviewable in this Court only on a writ of certiorari, and not on a writ of error.

> "The claim that the lease contract was made in course of interstate commerce and therefore not subject to state statutes, was insufficient to challenge the validity of the latter; at most it asserted but a 'title, right, privilege, or immunity' under the Federal Constitution which might afford basis for certiorari but constitutes no ground for writ of error from this court."
>
> *Mergenthaler Linotype Co.* v. *Davis*, 251 U.S. 256, 259.

In *St. Louis &c. Ry. Co.* v. *Starbird*, 243 U.S. 592 (writ of error sued out before amendment of section 237, Judicial Code, September 6, 1916), suit on interstate bill of lading, the defense was referred to as predicated of a title, right, privilege, or immunity, claimed under a statute of the United States (594, 596, *et seq.*).

> *Atchison &c. Ry. Co.* v. *Robinson*, 233 U.S. 173, 180.
>
> See also *Creswill* v. *Knights of Pythias*, 225 U.S. 246, 258.

Same as to:

Federal Employers' Liability Act:

> *Wabash R.R.* v. *Hayes*, 234 U.S. 86, 91.

Seaboard Air Line v. *Horton*, 233 U.S. 492, 499.

Nor. Car. R.R. Co. v. *Zachary*, 232 U.S. 248, 257.

Action to recover excessive interstate freight charges:

Kansas City So. Ry. Co. v. *Albers Comm. Co.*, 223 U.S. 573, 591.

Action under Safety Appliance Act:

St. Louis &c. Ry. Co. v. *Taylor*, 210 U.S. 281, 287, 293.

(Syllabus:) Certiorari is the proper means of reviewing a judgment of a State Court affirming an award against a railroad company under a [State] workmen's compensation law, where the Federal question upon which the applicability, as distinct from the validity, of that law depends, is whether the injured employee was engaged in interstate commerce.

Southern Pacific Co. v. *Industrial Accident Comm.*, 251 U.S. 259.

Under section 237, Judicial Code, as amended September 6, 1916, the writ of error to the highest Court of a State was dismissed for want of jurisdiction:

Metropolitan West Side El. Ry. Co. v. *Hoyne*, 252 U.S. 573; 285 Ill. 246; right of State to compel public utility to reconstruct bridge over navigable stream.

Evansville &c. Co. v. *Logan*, 251 U.S. 543; 180 Ky. 216; State Court held that a steamboat company was engaged in interstate commerce as well as in intra-

state commerce, and was in the circumstances liable to a State franchise tax.

Minneapolis &c. Ry. Co. v. *Merrick Co.*, 41 Sup. Ct. 142; recovery of excess intrastate freight rate.

Minneapolis &c. Ry. Co. v. *Washburn Lignite Coal Co.*, 41 Sup. Ct. 140; carrier claimed State rate statute, as applied, violated Fourteenth Amendment.

Mergenthaler Linotype Co. v. *Davis*, 251 U.S. 256; claim that State regulated a contract made in interstate commerce.

Midland Linseed Co. v. *American Liquid Fireproofing Co.*, 41 Sup. Ct. 60; *Southern Pacific Co.* v. *Newman*, 249 U.S. 580; interstate bill of lading.

Taft Co. v. *Iowa*, 252 U.S. 569; 183 Iowa, 548; claim that cigarettes had been shipped in interstate commerce as original package.

Southern Pac. Co. v. *D'Utassy*, 251 U.S. 539; 225 N.Y. 694; 161 N.Y. Supp. 222; suit for cotton destroyed by fire while in interstate transit.

Oregon &c. Co. v. *Lumber Co.*, 248 U.S. 535; 84 Ore. 399; carrier failed to notify consignor of non-delivery of interstate shipment of freight.

Draper v. *Georgia &c. Ry. Co.*, 248 U.S. 539; 95 S.E. 16; suit on bond given in connection with interstate shipment, claimed to violate the Federal law.

Adams Express Co. v. *Reynolds*, 248 U.S. 548; 172 N.C. 487; interstate express shipment.

Baltimore &c. R.R. Co. v. *Black*, 248 U.S. 550; *Denver &c. R.R. Co.* v. *Baird*, 249 U.S. 587; 49 Utah, 58; interstate freight shipment.

Wheeler v. *Cincinnati &c. Ry. Co.*, 248 U.S. 548; 171 Ky. 436; *Zanesville &c. Ry. Co.* v. *Williams*, 248 U.S. 533; *Hogarty* v. *Philadelphia &c. Ry. Co.*, 250 U.S.

650; 255 Pa. 236; *Houston, Adm'x,* v. *Seaboard Air Line Railway Co.,* 251 U.S. 538; 123 Va. 290; *Briggs* v. *Union Pacific Railroad Co.,* 251 U.S. 540; 102 Kan. 441; *Andrews* v. *Virginian Ry. Co.,* 248 U.S. 272; *Wheeler* v. *Cincinnati &c. Ry. Co.,* 248 U.S. 548; 171 Ky. 436; *Chicago &c. Ry. Co.* v. *Basham,* 249 U.S. 164; *Denver &c. R.R. Co.* v. *Da Vella,* 249 U.S. 584; 165 Pac. 254; *Ann Arbor &c. R.R. Co.* v. *Manoloff,* 249 U.S. 583; *Southern Pacific Co.* v. *Terry,* 249 U.S. 592; 34 Cal. App. 330; *Chicago &c. Ry. Co.* v. *Van de Zande,* 252 U.S. 574; Federal Employers' Liability Act.

Rust Land & Lumber Co. v. *Jackson,* 250 U.S. 71; interstate boundary.

Dana v. *Dana,* 250 U.S. 220; *Kentucky Heating Co.* v. *Louisville,* 250 U.S. 653; 174 Ky. 142; *Zimmerman* v. *Corson County,* 249 U.S. 593; 39 S.D. 167; *Magnolia Bank* v. *Supervisors,* 248 U.S. 546; 72 South. 697; 111 Miss. 857; *Jett Bros. Co.* v. *Carrollton,* 252 U.S. 1; taxation by State claimed to violate Fourteenth Amendment.

Himes v. *Commonwealth,* 250 U.S. 653; 257 Pa. 249; State statute giving priority to tax lien claimed to violate Fourteenth Amendment, and the obligation of a contract.

Bond v. *Walters,* 41 Sup. Ct. 62; 38 Cal. App. 245; *Faxon* v. *Civil Township,* 250 U.S. 634; 36 N.D. 634; *Mongrain* v. *Aaron,* 41 Sup. Ct. 146; 174 Pac. 755; *Robinson* v. *Steele,* 248 U.S. 546; 91 Wash. 268; 95 Wash. 154; *Glasscock* v. *McDaniel,* 252 U.S. 575; 175 Pac. 737; *Boxley* v. *Scott,* 248 U.S. 550; 162 Pac. 688; *New Orleans Land Co.* v. *Leader Realty Co.,* 248 U.S. 550; 142 La. 169; *California* v. *Mono County Irr. Co.,* 249 U.S. 581; 32 Cal. App. 184; *California* v. *Pacific Power*

Co., 249 U.S. 581; 32 Cal. App. 175; arising under Federal Land Laws.

Powers v. *Scott County Milling Co.*, 249 U.S. 585; 112 Miss. 798; *Mason* v. *Shannon*, 252 U.S. 572; *Watson* v. *Mottley*, 249 U.S. 579; 75 South. 147; assertion of a Federal right by a trustee in bankruptcy.

New Orleans Land Co. v. *Roussel*, 252 U.S. 571; 79 South. 860; 143 La. 1058; claim that State Court failed to give full faith and credit to judgment of Federal Court.

Geary v. *Geary*, 251 U.S. 535; 102 Neb. 511, 515; claim that State Court did not give full faith and credit to the judgment of a Court in another State, as required by the Federal Constitution.

Louisiana Nav. Co. v. *Oyster Commission*, 250 U.S. 654; 143 La. 664; judgment of State Court claimed not to be due process of law.

Supreme Conclave v. *Wilson*, 249 U.S. 583; 174 N.C. 628; suit on policy of insurance, claim by plaintiff in error under article IV, section 1, of the Federal Constitution.

Hartenbower v. *Illinois*, 248 U.S. 550; 283 Ill. 591; conviction in State Court claimed to violate Federal law.

Simmons v. *Duart*, 251 U.S. 547; 231 Mass. 313; State Court upheld recovery for maritime injuries on common-law principles (*see post*, pp. 93, 94).

Under section 237, Judicial Code, as amended September 6, 1916, the final judgment of the highest Court of a State was reviewed on certiorari:

Penna. R.R. Co. v. *Kittanning Co.*, 253 U.S. 319; action to recover demurrage charges on interstate shipments.

Postal Tel.-Cable Co. v. *Warren-Godwin Co.*, 251 U.S. 27; *Postal Tel.-Cable Co.* v. *Dickerson*, 41 Sup. Ct. 60; 79 South. 719; *W.U. Tel. Co.* v. *Speight*, 41 Sup. Ct. 11; suits account of telegrams held to be interstate. Compare *W.U. Tel. Co.* v. *Boegli*, 251 U.S. 315.

New York Cent. R. Co. v. *Mohney*, 252 U.S. 152; suit by interstate passenger traveling on a pass.

Baltimore &c. R.R. Co. v. *Leach*, 249 U.S. 217; *Erie R.R. Co.* v. *Stuart*, 250 U.S. 465; damages to interstate shipment.

Galveston &c. Ry. Co. v. *Woodbury*, 41 Sup. Ct. 114; action for loss of baggage, defense interstate commerce.

Texas &c. Ry. Co. v. *Leatherwood*, 250 U.S. 478; interstate bill of lading.

Pryor v. *Williams*, 41 Sup. Ct. 36; *Philadelphia &c. Ry. Co.*, 253 U.S. 284; *Philadelphia &c. Ry. Co.* v. *Smith*, 253 U.S. 481; *Southern Pacific Co.* v. *Industrial Accident Comm.*, 251 U.S. 259; *Southern Pacific Co.* v. *Berkshire* (January 3, 1921, not yet reported); *Chicago &c. Ry. Co.* v. *Ward*, 252 U.S. 18; Federal Employers' Liability Act.

Brooks-Scanlon Co. v. *R.R. Comm.*, 251 U.S. 396; claim by carrier that State was attempting to compel its operation at a loss.

Bullock v. *Florida, ex rel.* (January 17, 1921, Case No. 262); claim that judgment of State Court deprived one of his property without due process of law.

Kenny v. *Miles*, 250 U.S. 58; *Gilcrease* v. *McCullough*, 249 U.S. 178; *Tyrell* v. *Shaffer*, 249 U.S. 582; Indian land title.

Northern Pac. Ry. Co. v. *McComas*, 250 U.S. 387; title to land dependent on Act of Congress.

Ward v. *Lone County*, 253 U.S. 17; non-taxability under Federal law of Indian allotments by State authority.

Under section 237, Judicial Code, as amended September 6, 1916, a petition for a writ of certiorari to review the judgment of the highest Court of a State was granted.

Pere Marquette Ry. Co. v. *French*, 250 U.S. 637; 204 Mich. 578; *Michigan Cent. R. Co.* v. *Owen*, 253 U.S. 481; 291 Ill. 149; *Union Pac. R.R. Co.* v. *Burke*, 251 U.S. 548; 166 N.Y. Supp. 100; suit on interstate commerce bill of lading.

Norfolk-Southern R.R. Co. v. *Owens*, 251 U.S. 550; 109 S.E. 617; suit against Director General on intrastate shipment.

Yazoo &c. R. Co. v. *Nichols*, 251 U.S. 550; 83 So. 5; suit for value interstate shipment claimed to have been in transit when destroyed by fire.

C. & N.W. Ry. Co. v. *Whitnack Produce Co.*, 41 Sup. Ct. 15; 178 N.W. 177; suit to enforce common-law liability of carrier on interstate shipment.

Seaboard Air Line Ry. Co. v. *Horton*, 248 U.S. 553; 175 N.C. 472; *Philadelphia & R. Ry. Co.* v. *Di Donato*, 253 U.S. 480; 109 Atl. 627; *Philadelphia & R. Ry. Co.* v. *Polk*, 253 U.S. 480; 109 Atl. 627; Federal Employers' Liability Act.

First National Bank v. *Mott Iron Works*, 41 Sup. Ct. 64; 103 S.E. 783; liability of national bank on guaranty.

First National Bank v. *Adams*, 41 Sup. Ct. 14; 84

South. 707; 85 South. 308; 108 Miss. 346; 116 Miss. 450; taxation of national bank by State authority.

Pembleton v. *Illinois &c. Assn.*, 251 U.S. 549; 289 Ill. 99; suit on foreign judgment.

W.U. Tel. Co. v. *Southwick*, 251 U.S. 549; 214 S.W. 987; suit for damages on account of error in interstate telegram.

Broadwell v. *Commissioners*, 249 U.S. 594; 175 Pac. 828; taxation by State of Indian lands.

Culpepper v. *Okla. tree*, 253 U.S. 480; 185 Pac. 971; *McLaren* v. *Fleischer*, 253 U.S. 479; 185 Pac. 967; title to land dependent on Act of Congress.

Certiorari denied after three months:

Rust Land & Lumber Co. v. *Jackson*, 250 U.S. 71.

(e) The question of interstate commerce, as applied to the case at bar, is disposed of in Mo. Pac. Ry. Co. v. *McGrew Coal Co., 244 U.S. 191, 200.*

In the record in the case cited (p. 31) is found a stipulation to the same effect as in the case at bar (Rec. pp. 25, 26). The point was assigned as error in the case cited (Brief of Plaintiff in Error, p. 14), discussed in that brief (p. 27), and overruled by the Court (244 U.S. 200).

(f) A common carrier receiving for shipment a car over its line entirely in a State, between intrastate points, cannot convert the shipment into interstate commerce by placing the car in a train containing other cars engaged in interstate commerce.

Hereinafter (pp. 28 *et seq.*) the nature and extent of State regulation of intrastate commerce is discussed.

It is respectfully submitted, if the test insisted on by plaintiff in error is accepted as determinative of the character of commerce, there would practically remain no intrastate commerce—because nearly every carrier, even those whose lines are entirely in a State handle both classes of commerce (*post*, pp. 91-93).

The validity of a State statute, claimed to be repugnant to the Interstate Commerce Clause of the Federal Constitution or the Interstate Commerce Act, cannot be attacked in a suit not based on an interstate commerce transaction.

> *Missouri &c. Ry. Co.* v. *Cade*, 233 U.S. 642, 648.

Accordingly, the plaintiff in error in this case is asserting a "right, title, privilege or immunity"; that is, the right to engage in interstate commerce, and the privilege of being immune from State control thereof. The plaintiff in error is claiming as a fact that the transactions involved in the case at bar constitute interstate commerce; otherwise, the plaintiff in error could not be heard to complain at all.

He who assails a statute as unconstitutional must show that his rights are affected by it.

> *Middleton* v. *Texas Power & Light Co.*, 249 U.S. 152, 157.
>
> *New York &c. R.R. Co.* v. *White*, 243 U.S. 188, 197.
>
> *Southern Ry. Co.* v. *King*, 217 U.S. 524, 534.
>
> *Collins* v. *Texas*, 223 U.S. 288, 295.
>
> *Gaar, Scott & Co.* v. *Shannon*, 223 U.S. 468, 473.
>
> *Hatch* v. *Reardon*, 204 U.S. 152, 160.

"It is most thoroughly established that before one may be heard to strike down state legislation upon the ground of its repugnancy to the Federal Constitution, he must bring himself within the class affected by the unconstitutional feature."

Arkadelphia Co. v. *St. Louis &c. Ry. Co.*, 249 U.S. 134, 149.

A party alleging the unconstitutionality of a State enactment must belong to the class to whom the protection of the Federal Constitution extends. The Court will not, at the instance of a party not belonging to the class affected by an alleged unconstitutional State Act go into an imaginary case on the ground that the law if unconstitutional as to one is so as to all.

Hampton v. *St. Louis &c. Ry. Co.*, 227 U.S. 456, 468, 469.
Williams v. *Walsh*, 222 U.S. 415, 423, 424.

But the carrier in the case at bar was not, as to the shipments now in question, engaged in interstate commerce. Surely if freight delivered to an interstate carrier takes on the character of the carrier, irrespective of the origin, course of shipment, and destination of the freight, the extensive consideration this Court has given to determining questions of interstate and intrastate commerce would have been avoided by the simple device of treating all freight carried by an interstate carrier as subject to Federal control.

". . . the essential character of the commerce, not its mere accidents, should determine" whether it is intrastate or interstate.

Texas &c. R.R. Co. v. *Sabine Tram Co.*, 227 U.S. 111, 126.

The distinction between intrastate and interstate commerce "is constitutional."

Weigle v. *Curtice Bros. Co.*, 248 U.S. 285, 288.

The long- and short-haul clause of the Kentucky Constitution upheld as to an intrastate shipment.

Louisville &c. R.R. Co. v. *Kentucky*, 183 U.S. 503, 518, 519.

Held invalid as to an interstate shipment.

Louisville &c. R.R. Co. v. *Eubank*, 184 U.S. 27, 43.

See 1 Watkins on Shippers & Carriers (3d ed.), sec. 52.

The Federal power to regulate interstate commerce does not "comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States."

Gibbons v. *Ogden*, 9 Wheat. 1, 194.

Employers' Liability Cases, 207 U.S. 463, 493.

Louisville &c. Co. v. *Siler*, 186 Fed. 176, 200; affirmed, 231 U.S. 298.

Arkansas Rate Cases, 187 Fed. 290; affirmed, 230 U.S. 553.

Congress does not have power to regulate intrastate commerce *per se*.

> *Sinnot* v. *Davenport*, 22 How. 227, 243.
> *Veazie* v. *Moor*, 14 How. 568, 574.
> *Memphis Merchants Exchange* v. *Railroad Co.*, 43 I.C.C. 378, 387.

A railroad extending from a point in Missouri to a point in Kansas, held an intrastate road as to that part thereof between points in Kansas and lying entirely in that State. There is a "distinction between state control over local traffic and Federal control over interstate traffic."

> *Mo. Pac. Ry. Co.* v. *Kansas*, 216 U.S. 262, 283.

> ". . . a train made up of cars some of which come from points without the state to points within the state, others from a point in the state to a point out of the state and still others being carried from one town to another town both in the state is engaged in both interstate and intrastate commerce."
>
> Fuller on Interstate Commerce, p. 66.

A railroad train may simultaneously contain intrastate and interstate cars.

> *New York Central R.R.* v. *Carr*, 238 U.S. 260.
> *Seaboard Air Line* v. *Koennecke*, 239 U.S. 352, 355.

In *Minneapolis &c. R.R. Co.* v. *Winters*, 242 U.S.

353, 356, reference is made to freight trains which "hauled both intrastate and interstate commerce."

A carrier may simultaneously be engaged in intrastate and interstate commerce.

So. Pac. Co. v. *Industrial Accident Comm.*, 251 U.S. 259.

New York Central R.R. Co. v. *White*, 243 U.S. 188, 191, 192.

Louisville &c. R.R. Co. v. *Parker*, 242 U.S. 13.

Ill. Cent. R.R. v. *Behrens*, 233 U.S. 473, 477.

Pedersen v. *Delaware &c. R.R. Co.*, 229 U.S. 146.

Erie R.R. Co. v. *Collins*, 253 U.S. 77.

Shohoney v. *Railroad Co.*, 223 Mo. 649, 664.

Probus v. *Illinois Central R. Co.*, 181 Ky. 7, 10.

State, ex rel., v. *Stock Yards Co.*, 94 Kan. 96.

Cousley v. *Railroad Co.*, 207 Ill. App. 565.

Defendant referred to as "a common carrier of both interstate and intrastate commerce."

Pinkney v. *Erie R. Co.* (Pa.), 109 Atl. 700.

". . . it does not follow because a carrier may be generally engaged in interstate commerce that it is therefore necessarily at all times so engaged in respect to every place and every instrumentality engaged in its business."

Perez v. *Union Pac. R.R. Co.* (Utah), 173 Pac. 236, 238.

A railway company may be engaged in interstate and intrastate commerce at one and the same time.

Chicago &c. R.R. Co. v. *Harrington*, 241 U.S. 177.
Mo. Pac. Ry. v. *Larrabee Mills*, 211 U.S. 612, 620.
Southern Ry. Co. v. *United States*, 222 U.S. 20, 27.
Employers' Liability Cases, 207 U.S. 463, 498, 508.

In *Lucchetti* v. *Philadelphia & R. Ry. Co.*, 233 Fed. 137, it is recognized that a carrier may be engaged in interstate commerce, and "likewise engaged in transportation within the state."

In *United States* v. *Erie R. Co.*, 166 U.S. 352, 355 (Safety Appliance Case), reference is made to "a train, composed of cars some of which are and some of which are not engaged in interstate traffic."

Norfolk & W. Ry. Co. v. *United States*, 177 Fed. 623, 628.
Louisville &c. R. Co. v. *United States*, 186 Fed. 280, 282.

The Safety Appliance Act has been construed to "embrace all cars used on any railway that is a highway of interstate commerce, whether the particular cars are at the time employed in such commerce or not."

Texas &c. Ry. Co. v. *Rigsby*, 241 U.S. 33, 38.
Southern Ry. Co. v. *United States*, 222 U.S. 20.

The Federal Hours of Service Act applied to a train containing freight moving from points within a State, as well as without, "in view of the unity and indivisibility of the service of the train crew."

Nor. Pac. Ry. Co. v. *Washington*, 222 U.S. 370, 375.

In *Erie R.R. Co.* v. *Winfield*, 244 U.S. 170, it is stated that the carrier was "engaged in both interstate and intrastate commerce. In some [cars] the freight was interstate, in others intrastate and in still others it was of both classes." It was also pointed out that an engineer "was employed in interstate commerce," and that "his employment also extended to intrastate commerce."

An injured employee held at the time to be engaged in intrastate commerce.

Bumstead v. *Mo. Pac. Ry. Co.*, 99 Kan. 589.

". . . one man may have duties including both interstate and intrastate commerce . . ."

Cincinnati &c. Ry. Co. v. *Hansford*, 173 Ky. 126, 128, 129.

One who engages in interstate commerce does not thereby submit all his business concerns to the regulating power of Congress.

The Employers' Liability Cases, 207 U.S. 463, 502.

In *Northern Pacific Ry. Co.* v. *Solum*, 247 U.S. 477,

484, it is recognized that the carrier had two routes between designated points, one intrastate and one interstate.

> "It is a matter of general knowledge, of which we may take judicial notice, that traffic of all kinds is conducted upon the same ship and passage. A boat may leave a lake port carrying passengers and freights destined for ports within the State and for ports beyond the State, . . . How would it be practicable to separate the items of expense entailed in the carriage *of these various classes?*" (italics ours).
>
> *Int. Com. Comm.* v. *Goodrich Transit Co.*, 224 U.S. 194, 213.

In *Texas &c. Ry. Co.* v. *Railroad Commission*, 105 Tex. 386, it was ruled that just as the Interstate Commerce Commission might require a report from a carrier as to both its intrastate and interstate commerce "to inform itself [the commission], so as to enable it to properly regulate the matters which are within its authority" (*Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U.S. 194, 216), a State Railroad Commission may, for the same purpose, do likewise.

> "The fact that the corporation is engaged in interstate commerce does not exempt it from control by the state in respect of all business done therein not directly connected with traffic between the states."
>
> *McGuire* v. *Railroad Co.*, 131 Iowa, 340, 369.

A State may tax that portion of the business of a railway represented by its intrastate commerce.

Railroad v. *Harris*, 99 Tenn. 684, 711, 712.

"Importation into one state from another is the indispensable element, the test, of interstate commerce."

United States v. *Colorado &c. R.R. Co.*, 157 Fed. 321, 323; 15 L.R.A. (N.S.) 167; certiorari denied, 209 U.S. 544.

The test of an interstate shipment is its origin or destination outside a State.

Hood v. *Delaware &c. Co.*, 17 I.C.C. 15, 20.

"Any carriage of goods which crosses a state line is interstate commerce. . . ."

Ex parte Koehler, 30 Fed. 867, 869.

"Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced."

The Daniel Ball, 10 Wall. 557, 565.
United States v. *Geddes*, 131 Fed. 452, 453, 454.

And not until then.

Coe v. *Errol*, 116 U.S. 517, 528.
Kidd v. *Pearson*, 128 U.S. 1.
United States v. *Boyer*, 85 Fed. 425, 432.

The commodity "must be actually started on its

movement to another State before it becomes part of an interstate shipment."

Chapman &c. L. Co. v. *Jonesboro &c. R.R. Co.*, 97 Ark. 309, 310.

"When a commodity has been delivered to a common carrier to be transported on a continuous voyage or trip to a point beyond the limits of the state where delivered, the character of interstate commerce attaches thereto."

Houston &c. Co. v. *Insurance Co.* (Tex.), 30 L.R.A. 713, 714.

"The movement of the poles did not become interstate commerce until by the act of the purchasers thereof the poles were started on their way to their destination in another state or country."

Nordgard v. *Marysville &c. Ry. Co.*, 218 Fed. 737, 740; affirmed, 243 U.S. 36, 40.

"When freight actually starts in the course of transportation from one State to another it becomes a part of interstate commerce."

Ill. Cent. R.R. v. *Louisiana R.R. Comm.*, 236 U.S. 157, 163.

Converse: *Penna. R.R.* v. *Mitchell Coal Co.*, 238 U.S. 251.

See *Chicago &c. Ry. Co.* v. *Wright*, 239 U.S. 548, 550.

Railroad Commission v. *Texas &c. Ry. Co.* 229 U.S. 336, 341.

As to interstate commerce: "The determining circumstance is that the shipment was but a step in the transportation of the coal to real and ultimate destinations *in another state*" (italics ours).

Philadelphia & R. Ry. Co. v. *Hancock*, 253 U.S. 284, 286.

State v. *Mo. Pac. Ry. Co.* (Neb.), 115 N.W. 614, 617.

In a case relating to the issue of a free pass, it was held: "The act of Congress only purports to apply to interstate transportation. Our legislative act does not in terms purport to deal with interstate transportation." The appellant traveled between points in Iowa on a free pass. Held, no question of interstate commerce arose.

Schultz v. *Parker*, 158 Iowa, 42, 54; Ann. Cas. 1915D, 553, 558.

"An interstate transaction contemplates a consignor without and a consignee within a state, or vice versa."

Hogan v. *Intertype Corporation* (Ark.), 206 S.W. 58, 59.

"If the places from which and to which passengers and property are carried, and the line over which they are carried, are within the state, then the commerce is domestic and is subject to state control. The transportation of property between points within a state by a railroad engaged in interstate traffic does not, of itself, determine

the character of the traffic and make it interstate commerce. It is not the character of the road by which property is transported, but the character of the traffic, that determines whether or not it is interstate or intrastate commerce."

Luken v. *Lake Shore &c. Ry. Co.*, 248 Ill. 377, 385, 386; 21 Ann. Cas. 82, 84.

"A shipment from a point in Kansas to a milling point in Kansas, where the connection of the shipper with the shipment absolutely ceases, is not any part of interstate commerce, although the consignee may take advantage of the milling in transit privilege."

Farmers' &c. Co. v. *Union Pac. R. Co.* (Kan.), 175 Pac. 599, 601, and cas. cit.

A shipment within a State between points therein; held intrastate.

Bracht v. *San Antonio &c. Ry. Co.*, 41 Sup. Ct. 150.

Heiserman v. *Railway Co.*, 63 Iowa, 732.

Alabama &c. Ry. Co. v. *McCleskey*, 160 Ala. 630.

L. & N. R.R. Co. v. *Ohio Valley Tie Co.*, 148 Ky. 718, 720.

Farrell v. *Railroad Co.*, 82 S.C. 410, 414.

Naumen v. *Great Northern Ry. Co.*, 131 Minn. 217.

Kolkmeyer v. *Railroad Co.*, 192 Mo. App. 188.

Hull v. *Railroad*, 193 Mo. 425.

Barker v. *Kansas City &c. Ry. Co.*, 94 Kan. 176.

St. Louis &c. Ry. Co. v. *True* (Tex. Civ. App.), 140 S.W. 837.

Galveston &c. Ry. Co. v. *J. H. Nations &c. Co.* (Tex. Civ. App.), 136 S.W. 833.

Missouri &c. Ry. Co. v. *Pace* (Tex. Civ. App.), 184 S.W. 1051.

State, ex rel., v. *Public Service Comm.*, 239 Mo. 63.

Chesapeake & O. Ry. Co. v. *Maysville Brick Co.*, 132 Ky. 643.

Alabama &c. R.R. Co. v. *McCleskey* (Ala.), 49 So. 433.

Batesville &c. R. Co. v. *Mims* (Miss.), 71 So. 827.

Strother v. *Atchison &c. Ry. Co.* (Mo. App.), 212 S.W. 404.

Service v. *Sumpter Valley Ry. Co.* (Ore.), 171 Pac. 202.

Chicago &c. Ry. Co. v. *Harrington* (Okla.), 143 Pac. 325.

Lynch v. *New York Central &c. R.R. Co.*, 153 N.Y. Supp. 633, 637.

New Jersey Fruit Exchange v. *Central Railroad Co.*, 2 I.C.R. 84.

Acme Cement Plaster Co. v. *Railroad Co.*, 21 I.C.C. 220.

Big Canon Ranch v. *Ry. Co.*, 20 I.C.C. 523.

Johnson v. *Railway Co.*, 22 I.C.C. 255.

Kempner v. *Railway Co.*, 37 I.C.C. 396.

Valley &c. R.R. Co. v. *Southern Pacific Co.*, 53 I.C.C. 397.

In *Galveston &c. Ry. Co.* v. *Wood-Hagenbarth Cattle Co.*, 105 Tex. 178, a shipper sued a carrier to recover alleged excessive freight charges. If the shipment, originating in Texas, had been an intrastate one, the shipper was entitled to recover; conversely, not.

> ". . . if there was a delivery of the cattle by the carrier to the consignee within the State, it was an intra-state shipment . . ." (182).

> "Traffic is either State or interstate traffic, according to its origin and destination. It is shipped by the consignor in the State where the consignee dwells, or it is not. If not, it is interstate traffic . . ."
>
> *Railway Commission* v. *Clyde Steamship Co.*, 5 I.C.C. 324, 369.

A shipment from a point within a State to another point in that State, over a line entirely in the State, "is an intrastate shipment."

> *Gulf &c. Ry. Co.* v. *Texas*, 204 U.S. 403, 409.
> *Oregon &c. Co.* v. *Campbell*, 180 Fed. 253, 256.
> *Chicago &c. Ry. Co.* v. *Ledbetter*, 106 Ark. 512, 514.
> *Mitchell &c. Co.* v. *Penna. R.R. Co.*, 241 Pa. 536, 542.

> "The question whether the statute violates the interstate commerce clause does not properly arise upon the record and need not be considered. The shipment involved was not interstate, but was wholly within the State. Hence the effect of the

statute as applied to interstate commerce is not involved."

McCutchen v. *Atlantic Coast Line R.R. Co.*, 81 S.C. 71, 76.

The defendant in the case cited is also engaged in interstate commerce (234 U.S. 280).

In *Atchison &c. Ry. Co.* v. *Harold*, 241 U.S. 371, 376, it is recognized that a car coming from a point without to a point within a State may thereafter become an intrastate shipment.

Lehigh Valley R.R. Co. v. *Barlow*, 244 U.S. 183.

Chicago &c. Ry. Co. v. *Iowa*, 233 U.S. 334, 343.

Gulf &c. Ry. Co. v. *Texas*, 204 U.S. 403.

Pennsylvania R. Co. v. *Knox*, 218 Fed. 748.

Likewise as to freight:

Settle v. *Baltimore &c. R. Co.*, 249 Fed. 913.

"Interstate movement ended when the gas passed into local mains."

Public Utilities Commission v. *Landon*, 249 U.S. 236, 246.

Rough lumber shipped within a State between points therein, held intrastate commerce, notwithstanding in a finished condition it might thereafter become interstate.

Arkadelphia Co. v. *St. Louis &c. Ry. Co.*, 249 U.S. 134, 151.

"The mere intention of the shipper [traveling with a circus], to ultimately continue his tour beyond the State of Arizona did not convert the contemplated intrastate movement into one that was interstate."

Southern Pacific Co. v. *Arizona*, 249 U.S. 472, 477.

(*g*) *No evidence was introduced showing that the State regulation of local commerce involved in this case, directly affected interstate commerce; or indeed affected it in any way.*

A State may regulate rates wholly intrastate, provided that it does not thereby directly interfere with or burden interstate commerce.

The Minnesota Rate Cases, 230 U.S. 352, 415.
Missouri Rate Cases, 230 U.S. 474.
Oregon &c. Co. v. *Campbell*, 230 U.S. 525.
Southern Pac. Co. v. *Campbell*, 230 U.S. 537.
Allen v. *St. Louis &c. Ry. Co.*, 230 U.S. 553.

All these cases distinctly recognize the duality of commerce: intrastate and interstate.

The Shreveport case (*Houston & Texas Ry. Co.* v. *United States*, 234 U.S. 342); *American Express Co.* v. *Caldwell*, 244 U.S. 617; and *Ill. Cent. R.R. Co.* v. *Public Utilities Commission*, 245 U.S. 493, when read in connection with *Chicago &c. Ry. Co.* v. *Pub. Utilities Commission*, 242 U.S. 333, 338, do not in any way militate against the right of State control in the case at bar.

A State has "full authority over shipments purely intrastate," so long as the regulation thereof does not "result in an unnecessary and unreasonable burden upon interstate commerce," but has only "an indirect effect upon such commerce."

> *Louisville &c. R.R. Co.* v. *Higdon*, 234 U.S. 592, 600.

In the following cases—

> *In re Rates &c. New York Central R.R. Co.*, 59 I.C.C. 290;
> *In re Intrastate Rates* (Illinois), 59 I.C.C. 350;
> *In re Wisconsin Passenger Fares*, 59 I.C.C. 391;
> *In re Arkansas Rates and Fares*, 59 I.C.C. 471;
> *In re Minnesota Fares and Charges*, 59 I.C.C. 502;
> *In re Iowa Passenger Fares and Charges*, 60 I.C.C. 55;
> *In re Montana Rates and Fares*, 60 I.C.C. 61—

the Interstate Commerce Commission, proceeded under section 13 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, to consider the effect of certain State regulation of intrastate passenger fares upon interstate passenger fares.

The Commission recognized the contemporaneous engaging by carriers in, and the distinction between, intrastate and interstate traffic (59 I.C.C. 291, 292). The Shreveport case (234 U.S. 342) and the Minnesota

Rate Cases (230 U.S. 399) are cited (59 I.C.C. 291, 294). Reference is made to the fact that intrastate and interstate passengers are "often riding in the same trains" (295).

With respect to the intrastate journey from Chicago to Rock Island, Illinois, and the interstate journey from Chicago to Davenport, Iowa, the Commission said: "Passengers for Davenport are carried in the same train and by the same railroad as those for Rock Island. The train carries one sleeping car which runs to Rock Island and another which goes to Davenport" (357). The Rock Island car was characterized as intrastate, the Davenport car as interstate.

> "All of the respondents [carriers] carry both state and interstate passengers on the same trains with the same service and accommodations. The state passenger, paying the lower rate, rides on the same train, in the same car, and perhaps in the same seat, with the interstate passenger who pays the higher rate" (393).
>
> "Interstate and intrastate passengers are carried on the same trains and accorded the same service"; they travel "on the same train, in the same car, and in the same seat" (505).
>
> "Interstate and intrastate passengers are transported in the same cars and trains under identical conditions and receive the same service" (60 I.C.C. 58).
>
> See also 60 I.C.C. 64.

The Commission did not undertake to convert intrastate into interstate commerce, nor abolish their distinctive characteristics. The Commission recognized

the existence of intrastate commerce rates and the direct effect thereof upon interstate commerce rates, and such direct effect is the basis for the action of the Commission in the cases cited.

A carrier "engaged largely in interstate transportation, is amenable to state regulation and state taxation as to any of its service, which is wholly performed within the State and not as a part of interstate transportation."

Penna. R.R. Co. v. *Knight*, 192 U.S. 21.

Intrastate rates may be regulated by State action.

Florida v. *Atlantic &c. Ry. Co.*, 56 Fla. 617; 47 So. 969; 32 L.R.A. (N.S.) 639.

The right of a State to regulate intrastate freight rates recognized:

Northern Pacific Ry. Co. v. *North Dakota*, 216 U.S. 579.

Covington &c. Bridge Co. v. *Kentucky*, 154 U.S. 204.

Georgia Banking Co. v. *Smith*, 128 U.S. 174, 179.

The Granger Cases, 94 U.S. 113-187.

Railroad Commission Cases, 116 U.S. 307, 325.

The right of a State to regulate intrastate commerce discussed:

State Public Utilities Comm. v. *Baltimore &c. R.R. Co.*, 281 Ill. 405.

Luken v. *Lake Shore &c. Ry. Co.*, 248 Ill. 377, 386.

State v. *Railroad Co.*, 56 Fla. 617.
State v. *Terminal Co.*, 41 Fla. 377.
Southern Ry. Co. v. *Railroad Comm.*, 42 Ind. App. 90.

A State may regulate intrastate commerce in circumstances not directly affecting interstate commerce.

Barnes on Interstate Transportation, sec. 50.
1 Drinker, Interstate Commerce Act, p. 78.
Fuller on Interstate Commerce, pp. 66 *et seq.*
Judson on Interstate Commerce (3d ed.), secs. 123, 134.
Ohio R.R. Commn. v. *Worthington*, 225 U.S. 101, 108.

See proviso, end of section 1, Interstate Commerce Act; 4 Fed. Stat. Ann. (2d ed.), pp. 337, 338.

Mo. Pac. Ry. v. *Larrabee Mills*, 211 U.S. 612, 620, 621.

To be invalid on that ground, State regulation must directly interfere with interstate commerce.

Field v. *Barber Asphalt Co.*, 194 U.S. 618, 622, 623.

A carrier does not, even under the Interstate Commerce Act, enjoy the natural, inalienable, absolute, constitutional right, in any and all circumstances, to charge a greater rate for a shorter haul.

Louisville &c. R.R. Co. v. *United States*, 245 U.S. 463.

United States v. *Merchants &c. Ass'n*, 242 U.S. 178.

United States v. *Louisville &c. R.R. Co.*, 235 U.S. 314.

Intermountain Rate Cases, 234 U.S. 476.

Skinner & Eddy Corp. v. *United States*, 249 U.S. 557.

Having stated the position of the shipper with respect to the issue of interstate commerce, let us analyze that of the carrier.

The plaintiff in error discusses the issue of interstate commerce in three briefs (IV, pp. 11-22; V, pp. 16-24; VI, 1-27). The principal authority cited is *Wabash &c. Ry. Co.* v. *Illinois*, 118 U.S. 557, *a case of shipments between points in Illinois and New York.*

> "If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid" (118 U.S. 654).

Mr. Justice MILLER wrote the opinion in that case. He had concurred in *The Granger Cases*, 94 U.S. 113 *et seq.*; and *Railroad Commission Cases*, 116 U.S. 307 *et seq.*; cited 118 U.S. 564. See also his separate concurring opinion (134 U.S. 459).

In *The Minnesota Rate Cases*, 230 U.S. 401, 414, 415, it was said of the Wabash case: "But no doubt was entertained of the State's authority to regulate rates for transportation that was wholly intrastate."

L. & N. R.R. Co. v. *Kentucky*, 183 U.S. 503, upholding the Kentucky long- and short-haul clause, as applied to intrastate shipments, was decided January 6, 1902. In the Cotting case (183 U.S. 79, 85), decided November 25, 1901, the Wabash case (118 U.S. 557), is cited as authority for the right of State regulation.

Plaintiff in error (Brief IV, p. 20) cites *L. & N. R.R. Co.* v. *Eubank*, 184 U.S. 33, a case of interstate shipment.

In *The Minnesota Rate Cases*, 230 U.S. 1, 428, 429, the Court reviews the two Kentucky long- and short-haul cases, one intrastate (*L. & N. R.R. Co.* v. *Kentucky*, 183 U.S. 503), and one interstate (*L. & N. R.R.* v. *Eubank*, 184 U.S. 27). It was pointed out that the Eubank case "had been argued before the first case had been decided," and that in the Eubank case "The authority of the former decision upholding the state law, as applied to places all of which were within the State, was in no way impaired and the court [in the Eubank case], fully recognized the power of the State to prescribe maximum charges for intrastate traffic although carried over an interstate road to points on the state line (184 U.S. pp. 33, 42)" 230 U.S. 429.

The Illinois long- and short-haul law has been upheld as to a local shipment:

Ill. Cent. R.R. Co. v. *People*, 121 Ill. 304.
People v. *R.R. Co.*, 246 Ill. 474.

In Brief IV, p. 12, plaintiff in error sets out a portion of its answer which it claims was stricken out on motion in the trial Court. An examination of the record (pp. 17, 18), will show that the motion to strike did not include that part of the answer quoted in

Brief IV, pp. 12, 13. To this part of the answer, a replication was filed (Rec. p. 19).

As to taking judicial notice that Missouri Pacific Railway Company was engaged in interstate commerce at the time of the shipments in question: This contention is negligible, because the fact itself is stipulated (Rec. pp. 25, 26). But an interstate carrier is not immune from State regulation when engaged in intrastate commerce (authorities *infra*).

In Brief IV, p. 18, are contained statements not borne out by the record (*see ante*, pp. 8 *et seq.*). The reference in Brief IV, p. 18, to the Missouri statute is negligible (244 U.S. 199), for the recovery sought to be impugned in the case at bar is predicated of a self-enforcing constitutional provision.

In Brief IV, p. 19, plaintiff in error cites *Wilmington Transp. Co.* v. *Railroad Commission*, 236 U.S. 151, a case upholding the right of a State to regulate intrastate transportation. It is distinctly pointed out (236 U.S. 155), that the Wabash case (118 U.S. 557, 577), recognized "the authority of the State to prescribe intrastate rates."

In Brief IV, p. 20, plaintiff in error gratuitously assumes that the Missouri statute "applies equally to interstate and intrastate shipments."

(*a*) The action is not based on the statute (244 U.S. 199).

(*b*) The statute has not been construed to apply to interstate shipments.

(*c*) The case at bar deals with intrastate shipments.

The Kirby case (225 U.S. 155), cited by plaintiff in error (Brief IV, p. 20), related to a contract to expe-

dite the shipment of freight; not to the recovery of an overcharge.

Either the carrier, in the case at bar, violated the law, or it did not. If it did not the shipper is not entitled to recover. If it did, the right of the shipper to recover is not lost because other shippers may not have availed themselves of their legal rights.

It must be remembered that the carrier did not plead as a defense:

(*a*) That it had, as to other shipments, violated the Missouri constitutional provision under which the shipper recovered in the case at bar.

(*b*) That other shippers had foregone their right to sue.

(*c*) The individual right of a shipper to recover an overcharge has never been made dependent upon the concurrence of others likewise situate.

The Spiller Cases, 253 U.S. 117.
Southern Pacific Co. v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531.

See cases on Measure of Damages, *post*, pp. 69 *et seq.*

Plaintiff in error, in Brief V, p. 16, again refers to the Missouri statute, which, as already shown, is negligible in the case at bar (244 U.S. 199). As to the constitutional provision (Brief V, p. 16):

(*a*) It has never been construed to apply to an interstate shipment.

(*b*) The shipments in the case at bar are intrastate.

(*c*) The constitutional provision is valid as to intrastate commerce. *Mo. Pac. Ry. Co.* v. *McGrew Coal Co.*, 244 U.S. 191, 200.

In Brief V, p. 16, it is claimed by plaintiff in error that the Missouri constitutional provision, under which the shipper recovered judgment in the case at bar, "imposes an unreasonable burden on interstate commerce."

This is a different contention than that the shipments in question are interstate; for if they be of that character, the State has no power to regulate them. The contention of "unreasonable burden" is an admission that the shipments are *intrastate*, coupled with the claim that, in regulating intrastate commerce, the State has unreasonably burdened interstate commerce.

> The Shreveport case (*Houston & Texas Ry.* v. *United States*), 234 U.S. 342.
>
> *American Express Co.* v. *Caldwell*, 244 U.S. 617.
>
> *Ill. Cent. R.R. Co.* v. *Public Utilities Commission*, 245 U.S. 493, 506.
>
> Compare: *Chicago &c. Ry. Co.* v. *Public Utilities Commission*, 242 U.S. 333.

In the case at bar, neither in the pleadings nor in the evidence, is any reference to any order of Interstate Commerce Commission with respect to the subject-matter of the controversy at issue herein. This Court does not take judicial notice of such action.

> *Robinson* v. *B. & O. R.R. Co.*, 222 U.S. 506, 511, 512.

Under the Interstate Commerce Law it is the Commission, not the carrier, who determines the necessary interrelationship of intrastate and interstate rates, in

case a regulation of the latter involves a regulation of the former.

No evidence was offered of any interrelation of intrastate and interstate commerce in the case at bar. There is a total absence of "controlling circumstances," the *sine qua non* of Federal authority as touching intrastate rates (244 U.S. 200).

In Brief V, p. 19, a difference is pointed out between the Interstate Commerce Act and the Missouri law, with respect to the long- and short-haul clauses thereof. What of it? The Missouri Constitution was adopted in 1875. No theory of law requires a State, as to an intrastate matter, to duplicate an Act of Congress on an interstate matter. Within their respective orbits, the Nation and a State are each supreme and immune from the control of the other.

Taylor v. *Beckham*, 178 U.S. 548, 570.

In Brief VI, pp. 1, 3, plaintiff in error contends that the State of Missouri claims that "it can penalize an interstate carrier, under the guise of its police power, for doing or failing to do what the Federal Government has held to be no violation of law," in that the State "asserts a right to assess a penalty upon the movement of intrastate commerce by a long- and short-haul clause which is different entirely from that obtaining against interstate commerce, and which to this extent, regulates the movement of interstate commerce."

Plaintiff in error contends (Brief VI, p. 4) that *McCulloch* v. *Maryland*, 4 Wheat. 316, decided in 1819—

". . . the government of the Union, though limited

in its powers, is supreme within its sphere of action" (4 Wheat. 405); ". . . the government of the Union and those of the States . . . are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other" (4 Wheat. 410); "The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission" (4 Wheat. 429);

"would clearly prevent a given State from penalizing an interstate carrier

[as to an intrastate transaction]

upon a different standard or for acts which could not be penalized under the regulatory provisions adopted by the National government" (Brief VI, p. 4).

The quotations made from the case cited demolish the contention stated.

Plaintiff in error, doing intrastate business in Missouri, complains (Brief VI, p. 5) that "under the guise of an exclusive intrastate regulation, the State adopts a different standard and penalizes

[as to intrastate commerce],

what would be a legitimate rate structure as to commerce moving between the States" (Brief VI, p. 5).

Counsel have evidently overlooked the Tenth Amendment to the Federal Constitution:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
>
> ". . . except as restrained by its own funda-

mental law, or by the Supreme Law of the Land, a State possesses all legislative power consistent with a republican form of government."

Halter v. *Nebraska*, 205 U.S. 34, 40.
Civil Rights Cases, 109 U.S. 3.
Andrews v. *Andrews*, 187 U.S. 14, 31.

"The legislative power of a State extends to everything within the sphere of such power, except as it is restricted by the Federal Constitution or that of the State."

Township of Pine Grove v. *Talcott*, 19 Wall. 666, 676.

". . . the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence."

Lane County v. *Oregon*, 7 Wall. 71, 76.

"It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States."

Collector v. *Day*, 11 Wall. 113, 124.

As to the right of a State to regulate a common carrier, see—

Reagan v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 393.

Mich. Cent. R.R. v. *Mich. R.R. Comm.*, 236 U.S. 615, 628.

Oklahoma v. *Railway Co.*, 220 U.S. 277.

As to the right of a State to administer its "own affairs," see—

United States v. *Railroad Co.*, 17 Wall. 322, 327 (Federal taxation of municipal corporation, held invalid).

"There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres."

Tarble's Case, 13 Wall. 397, 406.

"The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

Texas v. *White*, 7 Wall. 700, 725.

"Sovereignty of a state embraces the power to execute its laws and the right to exercise supreme dominion and authority, except as limited by the fundamental law."

People v. *Tool*, 117 Am. St. Rep. 198, 201; 35 Colo. 225, 234.

Presser v. *Illinois*, 116 U.S. 252, 267, 268.

South Carolina v. *United States*, 199 U.S. 437, 448.

". . . in the control of fisheries within the state, the state government is supreme."

United States v. *Alaska Packers Ass'n*, 79 Fed. 152, 158.
McCready v. *Virginia*, 94 U.S. 391.
Manchester v. *Massachusetts*, 139 U.S. 240, 259.

". . . congress has no power to establish rules of evidence for the State Courts."

Hale v. *Wilkinson*, 21 Gratt. (Va.), 75, 79.
Wade v. *Foss*, 96 Me. 230, 231.
4 Fed. Stat. Ann. (2d ed.), p. 292.

Plaintiff in error contends (Brief VI, p. 9) that the Missouri long- and short-haul clause, as to intrastate commerce, "necessarily affects the rates upon the same commodity moving interstate."

No evidence as to this was offered in the trial Court. No order of the Interstate Commerce Commission has been made with respect thereto. This is a legislative, not a judicial, question.

The Minnesota Rate Cases, 230 U.S. 352, 432, 433.

In the *Shreveport Case*, 234 U.S. 342, this Court was dealing with an order of the Interstate Commerce Commission. Likewise in *American Express Co.* v. *Caldwell*, 244 U.S. 617; *Ill. Cent. R.R. Co.* v. *State Public Utilities Comm.*, 245 U.S. 493. Converse: *Chicago &c. Ry. Co.* v. *Public Utilities Commission*, 242 U.S. 333.

Plaintiff in error cites *Gibbons* v. *Ogden*, in which it is ruled (9 Wheat. 1, 194):

"It is not intended to say that these words ["to

> regulate commerce," Fed. Const. Art. I, sec. 8] comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States."

Plaintiff in error apparently abandons his interstate commerce contention, and complains that the Missouri Court has held that a Missouri constitutional provision is self-enforcing (Brief VI, pp. 11, 12). Its action in so doing has not been disturbed by this Court (244 U.S. 191).

Plaintiff in error claims (Brief VI, p. 11) that in *Sloan* v. *Pacific R.R.*, 61 Mo. 24, the Supreme Court of Missouri held "the Act of 1872—upon which plaintiff McGrew always bases his damage suits in his petition" to be unconstitutional.

Again, we remark, this Court has sustained the right of the shipper to recover as based on the Constitution, not the statute, of Missouri (244 U.S. 199). The correctness of the ruling of the Supreme Court of Missouri, in holding the constitutional provision self-enforcing, is not a Federal question.

> *Chicago &c. Ry. Co.* v. *Iowa*, 233 U.S. 334, 344.
>
> *Alabama &c. Ry. Co.* v. *Mississippi Railroad Commission*, 203 U.S. 496, 501.
>
> *Mo. Pac. Ry. Co.* v. *Larrabee Flour Mills Co.*, 211 U.S. 612, 619.
>
> *York* v. *Washburn*, 129 Fed. 564, 569, 570.

But in the Sloan case (61 Mo. 24) the Act of 1872

was held invalid "so far as it affects the defendant" (61 Mo. 33). Reference was made to a charter exemption held to expire in 1878. The carrier in the case at bar is not in any way shown to be connected with the carrier in the Sloan case (244 U.S. 199).

The other question discussed in the Sloan case is clearly obiter.

Plaintiff in error claims (Brief VI, p. 13) that Missouri Public Service Commission "has approved and permits the Missouri Pacific to exact the rates on the longer hauls where, because of competitive conditions, it is not required to charge less than on the shorter hauls."

Such a plea:

(*a*) Does not raise a Federal question.

(*b*) Does not appear in any way in the record in the case at bar.

Judicial notice is not taken of the decisions of Interstate Commerce Commission, when relied upon as constituting a cause of action.

> *Robinson* v. *B. & O. R.R. Co.*, 222 U.S. 506, 511, 512.

The doctrine stated is in effect ruled in *McGrew* v. *Mo. Pac. Ry. Co.*, 114 Mo. 210, where it was held that a petition which failed to set out the rates fixed by a railroad commission was defective. For if the Court had taken judicial notice of such action, it would have been unnecessary to plead it. "No allegation shall be made in a pleading which the law does not require to be proved, . . ." R.S. Mo. 1909, sec. 1813. Bliss on Code Pleading (3d ed.), sec. 177. *Railroad Co.* v. *Loftin*, 105 U.S. 258.

(c) Is denied by the adjudications of the Commission.

> *Independent Breweries Co.* v. *Railway Co.*, 4 Mo. Pub. Serv. Com. 620, 623, *et seq.*
> *Mooney* v. *Missouri Southern R.R. Co.*, 5 Ib. 250, 258 (see 214 S.W. 379).

Then the interstate claim reappears in this form: That the interpretation by the Missouri Court of the Constitution of that State is discriminatory, "although the business moves wholly intrastate" (Brief VI, p. 14).

Contra:

> *L. & N. R.R. Co.* v. *Kentucky*, 183 U.S. 503.
> *Mo. Pac. Ry. Co.* v. *McGrew Coal Co.*, 244 U.S. 191, 200.

We parallel the contention of counsel and the decision of this Court:

Brief VI, p. 14:

"The anti-pass provision of the Hepburn Act of 1906 has been held by this Court to apply as well to transportation wholly within a state as to transportation without a state . . ." citing *New York &c. R.R. Co.* v. *Gray*, 239 U.S. 583.

239 U.S. 586:

"That the prohibition applies with respect to transportation within the bounds of a State *as part of an interstate journey* is clear."

> Compare *New York Central R. Co.* v. *Mohney*, 252 U.S. 152.

As already stated, the Shreveport case (234 U.S. 342), cited by plaintiff in error (Brief VI, p. 15), is predicated of an order of Interstate Commerce Commission. This is true also of *Skinner & Eddy Corporation* v. *United States*, 249 U.S. 557, which, however, does not in any way deal with intrastate commerce.

Again, counsel say that "Congress has prescribed and authorized the Interstate Commerce Commission to prescribe the difference in rates for shipments moving over long and short hauls to meet competitive conditions" (Brief VI, p. 17). As applied to interstate shipments, this statement is irrelevant, for we are not dealing with that question in the case at bar. As applied to intrastate shipments, there must be some action of Congress on that subject, either directly or through the Interstate Commerce Commission, before the State rates are affected by considerations of an interstate nature.

> *The Minnesota Rate Cases*, 230 U.S. 352, 432, 433.

Plaintiff in error (Brief VI, p. 18) claims that the Missouri Pacific is "Seventy six miles longer to Joplin, Missouri, and Pittsburg, Kansas, and points in the Kansas lead-smelting section than the Frisco, from St. Louis," and refers to the Missouri decisions in the McGrew cases for evidence of these facts. The only place in these decisions where distances are discussed is the dissenting opinion, *McGrew* v. *Mo. Pac. Ry. Co.*, 230 Mo. 496, 585. Again, none of the rates complained of in the case at bar are predicated of rates from St. Louis to Joplin, Mo., or Pittsburg, Kansas. Then, too, the Missouri Pacific Railway Company, if it hauls coal

from St. Louis to Joplin, and sees wise, in order to get it, to meet the competition of a carrier who has a shorter route, it may do so, but cannot then charge others a greater rate for a shorter distance.

McGrew v. *Mo. Pac. Ry. Co.*, 230 Mo. 496.
Mo. Pac. Ry. Co. v. *McGrew Coal Co.*, 244 U.S. 191.

See also—

4 Mo. P.S.C. 7, 620, 623; 5 Ib., 250, 258; 214 S.W. 379.

But a carrier may not determine for itself whether it will charge a lesser rate for a longer interstate haul; the Interstate Commerce Commission decides that.

Import & Domestic Rates, 36 I.C.C. 389, 399.
Green v. *Railway Co.*, 43 I.C.C. 662, 677.
Railroad Commission Co. v. *Southern Pacific Co.*, 21 I.C.C. 329, 335.

". . . a general enforcement of the long and short haul clause would not be repugnant to the Constitution . . ."

Intermountain Rate Cases, 234 U.S. 476, 488, 489.

That a State has the power to "enforce an equality of local rates as between all parties shipping for the same distance over the same road" cannot be doubted.

Alabama &c. Ry. Co. v. *Mississippi R.R. Comm.*, 203 U.S. 496, 501.

The facts of which the contention is predicated that a State regulation of intrastate rates of a carrier is void should be established and the question determined as an issue of fact.

Chicago &c. Ry. Co. v. *Wellman*, 143 U.S. 339.

See also—

Atlantic Coast Line v. *Florida*, 203 U.S. 256.

Missouri Rate Cases, 230 U.S. 474, 508, 509.

L. & N. R.R. Co. v. *Finn*, 235 U.S. 601, 610.

Mo. Pac. Ry. Co. v. *McGrew Coal Co.*, 244 U.S. 191, 200.

Plaintiff in error (Brief VI, p. 18) cites *L. & N. R.R. Co.* v. *Eubank*, 184 U.S. 34 (the interstate case), without citing *L. & N. R.R. Co.* v. *Kentucky*, 183 U.S. 503 (the intrastate case). Both cases are reviewed and upheld, 230 U.S. 428, 429. See, also, as to the intrastate case, 234 U.S. 489; 244 U.S. 200.

Plaintiff in error (Brief VI, p. 23) refers to the necessity of a "uniform regulation" as to intrastate and interstate commerce. This is not a judicial question (230 U.S. 432, 433). Reference is then made to judgments recovered by the McGrews, and payments thereof, "which no other shippers in the state have received." Where is the evidence of this fact? And how relevant?

Plaintiff in error (Brief VI, p. 23) refers to coal moving from the Illinois fields to "Southwest Missouri and Southeastern Kansas points." No one is contending that an interstate rate *per se* reduces an intrastate rate. The interstate rate may be evidence

of the proper intrastate rate, but is not controlling. Then, too, the only comparative rates in the record in this case are from Waverly to Kansas City and Liberal to Granby, neither of which have any relation to shipments from Illinois, or to interstate commerce.

The reference to *Memphis Southwestern Investigation*, 55 I.C.C. 515, reveals an instance of the Interstate Commerce Commission applying the doctrine of the Shreveport case (234 U.S. 342), to intrastate rates. No such action has been taken in the case at bar. The same is true of *Memphis* v. *Chicago &c. Ry. Co.*, 39 I.C.C. 256.

It is pointed out, *Intermountain Rate Cases*, 234 U.S. 476, 485, that the right of a carrier to charge more for a shorter haul on an interstate shipment is predicated of an order granted on hearing and evidence, by the Interstate Commerce Commission.

It is solemnly argued that this somnolent authority on the part of the Interstate Commerce Commission as to interstate commerce, operative only when awakened to action, becomes *ipso facto* operative as to all intrastate commerce, without any action whatever on the part of the commission!

The decisions of this Court deny such contention.

The Minnesota Rate Cases, 230 U.S. 352, 432, 433.

Chicago &c. Ry. Co. v. *Public Utilities Commission*, 242 U.S. 333.

Mo. Pac. Ry. Co. v. *McGrew Coal Co.*, 244 U.S. 191.

Ill. Cent. R.R. Co. v. *Public Utilities Commission*, 245 U.S. 493.

II.

THE SECOND POINT MADE BY PLAINTIFF IN ERROR, THAT THE MISSOURI CONSTITUTIONAL AND STATUTORY PROVISIONS VIOLATE THE FOURTEENTH AMENDMENT (Brief V, p. 24), IS WITHOUT MERIT.

(a) The recovery in the case at bar is not based on the statute cited, but upon a self-executing constitutional provision; hence the statutory provision is negligible. Missouri Pacific Ry. Co. v. McGrew Coal Co., 244 U.S. 191, 199.

(b) The Missouri constitutional provision, absent a "controlling circumstance of a character not here disclosed" (244 U.S. 200), is valid on its face; hence a question relating to its applicability, as distinguished from its validity, cannot be reviewed on writ of error, but only on certiorari. Mergenthaler Linotype Co. v. Davis, 251 U.S. 256; Kenney v. Supreme Lodge, 252 U.S. 411, 416.

The contention that the Missouri constitutional provision, under which the judgment now under review was sustained by the State Supreme Court, violates the Fourteenth Amendment, stands denied by this Court.

Mo. Pac. Ry. Co. v. *McGrew Coal Co.*, 244 U.S. 191, 200.

The cases cited by plaintiff in error (Brief V, p. 24) do not sustain its contention to the contrary.

Penna. R.R. Co. v. *International Coal Min. Co.*, 230 U.S. 184, arose under the Interstate Commerce Act

and was disposed of on the facts. Recoveries of overcharges have been sustained under that act: *Mecker & Co.* v. *Lehigh Valley R.R. Co.*, 236 U.S. 412; *Mills* v. *Lehigh Valley R.R. Co.*, 238 U.S. 473; *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531; *The Spiller Cases*, 253 U.S. 117.

Smyth v. *Ames*, 169 U.S. 466, was decided upon the facts. None were introduced in evidence in the case at bar.

See *Missouri Rate Cases*, 230 U.S. 474, 508.

Chicago &c. Ry. Co. v. *Wellman*, 143 U.S. 339.

Louisville &c. R.R. Co. v. *Finn*, 235 U.S. 601, 610.

Atlantic Coast Line v. *Florida*, 203 U.S. 256.

Mo. Pac. Ry. v. *McGrew Coal Co.*, 244 U.S. 191, 200.

Lehigh Valley R.R. v. *American Hay Co.*, 219 Fed. 539, 541, is an interstate commerce case, predicated largely of the *Mecker Case*, 211 Fed. 785, reversed 236 U.S. 412, and of *Penna. R.R. Co.* v. *International Coal Co.*, 230 U.S. 184, distinguished in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 534.

In *Chicago &c. Ry. Co.* v. *Minnesota*, 134 U.S. 418, the State Court had declined to receive evidence as to the reasonableness of the established rate. In the case at bar no such evidence was offered.

In Brief VI, pp. 28 *et seq.*, plaintiff in error extensively quotes from *Penna. R.R. Co.* v. *International Coal Mining Co.*, 230 U.S. 184, wholly overlooking the

Mills, Meeker, Darnell-Taenzer, and Spiller cases, *supra*.

Then too, a Federal construction of the Interstate Commerce Act does not operate to nullify a State construction of an Intrastate Commerce Act, even if the language of the two Acts were identical.

See cases as to National and State sovereignty, respectively.

By the Fifth Amendment to the Federal Constitution, no one shall, by Federal authority, be deprived of "life, liberty or property without due process of law." As the long- and short-haul clause of the Interstate Commerce Act (*Intermountain Rate Cases*, 234 U.S. 476) and the reparations awarded under that Act (see the Mills, Meeker, Darnell-Taenzer, and Spiller cases, *supra*), do not violate that amendment, neither does the long- and short-haul clause of the Missouri Constitution, and the reparation awarded in the case at bar, violate the Fourteenth Amendment to the Federal Constitution. *Mo. Pac. Ry. Co.* v. *McGrew Coal Co.*, 244 U.S. 191, 200.

III.

THE THIRD POINT MADE BY PLAINTIFF IN ERROR PRESENTS A QUESTION—

(a) Not reviewable in this Court on writ of error;

(b) Not Federal in its nature;

(c) Unanimously decided by all the authorities in favor of the ruling in the Court below.

Running through three of the briefs of plaintiff in error (IV, V, and VI), stated in various forms, is the

claim that it is deprived of its property without due process of law, in that the shipper (it is claimed) recovered a judgment without proof of damage sustained.

The coal in question was shipped f.o.b. destination. The receiver paid an illegal freight rate and was reimbursed therefor by the shipper. The State Court sustained a recovery by the shipper of the excess charged, on the theory that on general principles of law, the cause of action otherwise existing in the receiver, had in the circumstances vested in the shipper. Any alleged error in such a ruling is not reviewable on writ of error to a State Court, under section 237, Judicial Code, amended September 6, 1916. Such a ruling does not "draw in question the *validity* of a treaty or statute of, or an authority exercised under the United States," for there is nothing in the Federal law which regulates the question of parties to actions to recover illegal intrastate freight rates. Nor does such ruling draw "in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws, of the United States . . ." (see Brief III, pp. 34 *et seq.*). Nor does the correctness of such ruling present a Federal question. The Fourteenth Amendment, in guaranteeing due process of law by State authority, does not guarantee correctness of judicial decision. If it did, every case decided in the United States by a State Court would be within the jurisdiction of this Court.

Central Land Co. v. *Laidley*, 159 U.S. 103, 110, 112: "when the parties have been fully heard in the regular course of judicial proceedings, an erroneous deci-

sion of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States."

Bonner v. *Gorman*, 213 U.S. 86, 91.
Tracy v. *Ginzberg*, 205 U.S. 170, 178.
Delmar Jockey Club v. *Missouri*, 210 U.S. 324, 335.
Remington Paper Co. v. *Watson*, 173 U.S. 443, 451.
Weber v. *Rogan*, 188 U.S. 10, 14.
Gulf &c. R.R. Co. v. *Hewes*, 183 U.S. 66, 76.
West v. *Louisiana*, 194 U.S. 258, 262, 263.
Harding v. *Illinois*, 196 U.S. 78, 83.
Ballard v. *Hunter*, 204 U.S. 241, 258.
Fisher v. *New Orleans*, 218 U.S. 438, 440.

On the merits, the authorities are unanimous in supporting the right of recovery of a consignor who has sold goods f.o.b. destination, and reimbursed the consignee who paid an illegal freight charge (see Brief III, pp. 12 *et seq.*).

Southern Pacific Co. v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, stands as an affirmance of the same case, 229 Fed. 1022. The history of that litigation may be gained by consulting *Darnell-Taenzer Lumber Co* v. *Southern Pac. Co.*, 221 Fed. 890; s.c., 190 Fed. 659; also *Burgess* v. *Transcontinental Freight Bureau*, 13 I.C.R. 668, 680.

In that case, "the majority of the shipments were made f.o.b. Coast points (the shipper, therefore, in fact paying the freight, notwithstanding in commer-

cial practice the consignee paid the freight bill on delivery of the lumber, remitting the shipper the balance of the bill); . . ." (221 Fed. 894).

> "Frequently a manufacturer will sell the goods delivered at a particular point, but allow the consignee to advance the freight thereto, deducting the amount advanced from the purchase price of the goods. In such a case, the manufacturer has paid the freight and is entitled to the overcharge."
>
> 1 Watkins on Shippers & Carriers (3d ed.), sec. 213.

It is clear that if the consignor had not agreed to deliver the coal f.o.b. destination, and the consignee had paid the illegal freight, the latter would have been entitled to recover the amount therof.

In *Spiller* v. *Atchison &c. Ry. Co.*, 253 U.S. 117, this Court sustained a recovery, by the assignee of a shipper, of an excessive rate charged by a carrier. "The principal defense before the [Interstate Commerce] Commission was that the payment of a published rate afterwards decided to have been excessive was not evidence that the party who paid the freight sustained damage to the amount of the excess. The Circuit Court of Appeals sustained this contention at the first hearing, 246 Fed. 1, 23. But it has since been ruled otherwise by this court, *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 534; and, in view of this, upon the rehearing the Circuit Court of Appeals withdrew this part of its former opinion, 249 Fed. Rep. 677" (253 U.S. 133).

Meeker v. *Lehigh Valley R.R. Co.*, 236 U.S. 412, 429.

Mills v. *Lehigh Valley R.R. Co.*, 238 U.S. 473.

Arkadelphia Co. v. *St. Louis &c. Ry. Co.*, 249 U.S. 134.

Texas &c. Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 436.

Missouri v. *Chicago &c. R.R. Co.*, 241 U.S. 533; 248 U.S. 589.

Detroit & M. Ry. Co. v. *Fletcher Paper Co.*, 248 U.S. 30.

A shipper may recover freight paid "where the charge is in excess of that allowed by law" (note, 61 Am. St. Rep. 253).

Union Pac. Ry. Co. v. *Goodridge*, 149 U.S. 680, 697.

"The theory upon which the plaintiff recovers is that the defendant has received the money wrongfully, and the law implies a promise to pay it."

Hilton Lumber Co. v. *Railroad Co.*, 6 L.R.A. (N.S.) 225, 235; 141 N.C. 171, 192.

"Where a company charges a customer a larger sum for transportation than it is legally entitled to charge, he may recover the excess in an action for money had and received, together with interest thereon."

1 Wood on Railroads (Minor's edition, 1894), sec. 206.

"The right of a party from whom has been exacted payment of rates of carriage in excess of those fixed by charter or statute, is no longer open to serious question."

Pingree v. *Mutual Gas Co.*, 107 Mich. 156, 158.

". . . where a common carrier charges for carriage rates in excess of those allowed by law, and a party is compelled to pay those rates to have his goods carried, the payment is regarded as compulsory, and may be recovered back" (note, 45 Am. Dec. 169).

Harmony v. *Bingham*, 12 N.Y. 99; 62 Am. Dec. 142.

"If overcharges made in violation of this section of the statute cannot be recovered back, the statute is itself a nullity."

Chicago &c. R.R. Co. v. *Wolcott*, 141 Ind. 267, 279; 50 Am. St. Rep. 320, 328.

To the same effect:

Mobile &c. Ry. Co. v. *Steiner*, 61 Ala. 559, 594 (sustaining recovery for overcharges plus penalty), and cases cited.

Heiserman v. *Railway Co.*, 63 Iowa, 732, 736, 737.

Lafayette &c. R.R. Co. v. *Pattison*, 41 Ind. 312.

Southern Ry. Co. v. *Anniston &c. Co.*, 135 Ala. 315, 318; 33 So. 274.

Manufacturing Co. v. *Railroad*, 106 N.C. 207, 209.

Directors v. *Sutton*, 38 Law Journal (N.S. 1869), Exch. 177, 184, 192.

Parker v. *Great Western Ry. Co.*, 7 Mann. & Gr. 253, 293: defendants cannot "retain the money that they have improperly received."

"And in *Parker* v. *Great Western Railway Company*, 7 M. & Gr. 253, the wholesome principle was recognized that payments made to a common carrier to induce it to do what by law, without them, it was bound to do, were not voluntary and might be recovered back" (111 U.S. 22, 29).

Directors v. *Gidlow*, L.R. 7 H.L. 517, 527.
Peters v. *Railroad Co.*, 42 Ohio St. 275; 51 Am. Rep. 814, note, 833.

Where a railroad charged a rate of freight in excess of that fixed by a valid contract, the difference is recoverable.

Railroad Co. v. *Coal Co.*, 79 Ill. 121, 130.

". . . if excessive freight is paid as a condition . . . to their delivery [goods] after shipment, its payment is regarded as made by compulsion of circumstances and may be recovered . . ." (note, 94 Am. St. Rep. 421).

There is a clear distinction between an unreasonable rate and an overcharge.

Peanut Co. v. *R.R. Co.*, 166 N.C. 62, 73.

Penna. R.R. Co. v. *Int. Coal Min. Co.*, 230 U.S. 184, 202.

Southern Pac. Ry. Co. v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531.

A violation of the long- and short-haul clause of a Traffic Act, held to be an overcharge.

Cleveland &c. Ry. Co. v. *Mills Bros.* (Ohio), 128 N.E. 81.

The measure of damages in the case of the exaction of an illegal rate by a carrier is the difference between the rate exacted and the legal rate.

London &c. Ry. Co. v. *Evershed*, L.R. 3 App. Cas. 1029; s.c., 2 Q.B. 254.

Crouch v. *London &c. Ry. Co.*, 2 C. & K. 789.

Merrick Co. v. *Minneapolis &c. Ry. Co.*, 35 N.D. 331.

Chapman & Dewey Lbr. Co. v. *Jonesboro &c. R.R. Co.*, 97 Ark. 300, 307.

Sullivan v. *Minneapolis &c. Ry. Co.*, 121 Minn. 612; 142 N.W. 3; 45 L.R.A. (N.S.) 612.

Katz-Craig Contr. Co. v. *Railway Co.*, 93 Neb. 674.

Seawell v. *Railway Co.*, 119 Mo. 222.

Great Northern Ry. Co. v. *Hocking Valley F.C. Co.*, 166 Wis. 465.

New York &c. Co. v. *New York Central R.R. Co.* (Pa.), 110 Atl. 286.

Inman & Co. v. *St. Louis &c. Ry. Co.*, 14 Tex. Civ. App. 39, 56.

Hunter v. *Railroad Co.*, 167 Mo. App. 624.
Galveston &c. Ry. Co. v. *Nations &c. Co.* (Tex. Civ. App.), 136 S.W. 833.
Cullen v. *Railroad Co.*, 63 Fla. 122; see also 63 Fla. 208.
Florida East Coast Ry. Co. v. *State* (Fla.), 82 So. 136.
No. Pac. R.R. Co. v. *Fields Bros.* (Ark.), 203 S.W. 1036.
Southern Ry. Co. v. *Schlittler*, 1 Ga. App. 20.
Hutchison v. *L. & N. R.R. Co.*, 108 Ky. 615.
Baltimore &c. R.R. Co. v. *Shirk*, 56 Ind. App. 42.
White v. *Delano*, 270 Mo. 16.
Love v. *North American Co.*, 229 Fed. 103.
Waterman v. *Chicago &c. Ry. Co.*, 61 Wis. 464.
State, ex rel., v. *Chicago R.R. Co.*, 265 Mo. 646, 680.
Big Diamond Milling Co. v. *Chicago &c. Ry. Co.* (Minn.), 171 N.W. 799.
California Adjustment Co. v. *Railway Co.* (Calif.), 175 Pac. 682, 684.
McAdams v. *Express Co.*, 139 La. 682, 686.
Louisville &c. Co. v. *Wilson*, 132 Ind. 517; 18 L.R.A. 105.
Cook v. *Railway Co.*, 81 Iowa, 551; 25 Am. St. Rep. 512; 9 L.R.A. 764.
Southwestern &c. Ry. Co. v. *Maddox*, 146 Ala. 539, 541.
Clough v. *Railroad*, 77 N.H. 222, 251.
Transportation Co. v. *Sweetzer*, 25 W. Va. 434, 447.

Hays v. *Pennsylvania Co.*, 12 Fed. 309.
Railway Co. v. *Milling Co.*, 79 Kan. 435.
Carrier v. *Railway Co.*, 79 Iowa, 80.
Taylor-Williams Co. v. *Public Utilities Commission*, 97 Ohio St. 224, 231.
Note, 18 L.R.A. (N.S.) 124.
L. & N. R.R. Co. v. *Walker*, 110 Ky. 961, 965.

The theory of the cases (*Chicago &c. Ry. Co.* v. *Minnesota*, 134 U.S. 418; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362; *Smyth* v. *Ames*, 169 U.S. 466) is that the reasonableness of statutory railroad regulation is a subject of judicial inquiry. Consult, *Prentis* v. *Atlantic Coast Line*, 211 U.S. 210; *Portland Ry. Co.* v. *Oregon R.R. Comm.*, 229 U.S. 397.

In the case at bar, plaintiff in error has had the privilege of full hearing before a judicial tribunal. The judgment in favor of the shipper carries with it, by necessary implication, a finding of every fact necessary to support the judgment.

"The judgment of the court is an adjudication upon all matters of law and fact which are essential to support the judgment rendered."

St. Joseph Union Depot Co. v. *Chicago &c. Ry. Co.*, 89 Fed. 648, 651, 658.
Last Chance Min. Co. v. *Tyler Min. Co.*, 157 U.S. 683, 691.
New Orleans v. *Citizens' Bank*, 167 U.S. 371, 397.
Fayerweather v. *Rich*, 195 U.S. 276.
Harding v. *Harding*, 198 U.S. 317.

Shook v. *Shook* (Tex. Civ. App.), 145 S.W. 699, 703.

Freeman on Judgments (4th ed.), sec. 257.

Where "the verdict could not have been rendered without deciding the particular matter in question," the judgment "will be considered to have settled that matter as to all future actions between the parties."

Aurora City v. *West*, 7 Wall. 82, 103.

(Syllabus:) Every sentence of condemnation by a competent Court having jurisdiction of the subject-matter of its judgment is conclusive as to the title of the thing claimed under it.

Rose v. *Himely*, 4 Cranch, 241.

A question "directly involved" is concluded by the judgment rendered.

Wiswall v. *Sampson*, 14 How. 52, 69.

Likewise, as to a question "necessarily decided"—

State, ex rel., v. *Branch*, 134 Mo. 592, 604; 56 Am. St. Rep. 533, 540—

or "necessarily involved therein."

Cooper v. *Brown*, 143 Iowa, 482, 495; 136 Am. St. Rep. 768, 777.

The judgment concludes "every component fact necessarily involved in its determination."

People's Water Co. v. *Pittston*, 241 Pa. 208, 212.

The judgment "stands as an absolute finality, not merely as to the conclusions expressed, but as to everything directly or necessarily involved in reaching them."

Lokowich v. *Helena*, 46 Mont. 575, 581.

In Missouri, in an action at law, the weight of the evidence is not open to review on appeal (see *ante*, p. 10).

Slicer v. *Owens*, 241 Mo. 319, 325.
Chilton v. *Nickey*, 261 Mo. 232, 243.
Byrd v. *Vanderburgh*, 168 Mo. App. 112, 118.
Schwiete v. *Guerre*, 175 Mo. App. 687, 696.
Bowman v. *Shelton*, 175 Mo. App. 696, 705.

Hence it follows that in the case at bar, upon judicial hearing, it has been adjudged by a State Court, affirmed on appeal, that the shipper has in law been damaged to the amount of the illegal intrastate freight rate charged by a carrier, in excess of the legal rate. On that issue, the carrier has had its day in Court.

A carrier who has had the opportunity of a judicial determination of an alleged confiscatory intrastate rate regulation (the only ground of Federal interference in such a case) cannot claim that it is deprived of its property without due process of law.

Louisville &c. R.R. v. *Garrett*, 231 U.S. 298, 310, 311.
Louisville &c. R.R. v. *Finn*, 235 U.S. 601.
Kentucky Railroad Tax Cases, 115 U.S. 321.
Davidson v. *New Orleans*, 96 U.S. 97, 105.
Fallbrook Irr. Dist. v. *Bradley*, 164 U.S. 112, 157.

The guaranty of due process of law does include the right of appeal.

Saylor v. *Duel*, 236 Ill. 429; 86 N.E. 119; 19 L.R.A. (N.S.) 377, and note.
Reetz v. *Michigan*, 188 U.S. 505, 508.
Rogers v. *Peck*, 199 U.S. 425, 435.
Bearden v. *Davis*, 139 Ga. 635, 641.
Ex parte Januszewski, 196 Fed. 123, 131.

A State may prescribe the terms upon which an appeal in its Courts is granted.

Kohl v. *Lehlback*, 160 U.S. 293, 297.
McKane v. *Durston*, 153 U.S. 684, 687.
Andrews v. *Swartz*, 156 U.S. 272.
Lott v. *Pittman*, 243 U.S. 588, 591.

Hence the fact that in Missouri, in actions at law, the weight of the evidence is not open on appeal, does not present a Federal question.

The fact upon which the judgment of the State Court is based is not open to review in this Court.

"Ordinarily, in cases which came before us for review, this court accepts the facts as found by the State Supreme Court."

Portland Ry. Co. v. *Oregon R.R. Comm.*, 229 U.S. 397, 411.
Nor. Pac. Ry. v. *North Dakota*, 236 U.S. 585, 593.
Chrisman v. *Miller*, 197 U.S. 313, 319.
Adams v. *Church*, 193 U.S. 510, 513.
Dower v. *Richards*, 151 U.S. 658.
Egan v. *Hart*, 165 U.S. 188.

It must be remembered that the right of McGrew Coal Company to recover the excess of freight paid by it in circumstances like those arising in the case at bar stands adjudged (*Mo. Pac. Ry. Co.* v. *McGrew Coal Co.*, 244 U.S. 191); that as consignor it became liable to the carrier for the freight charges on the coal shipped (cases *infra*); that consignee discharged this liability *pro hac vice* the consignor, which in turn reimbursed the consignee.

A consignor is primarily liable for the freight charges.

Chicago &c. Ry. Co. v. *Greenberg* (Minn.), L.R.A. 1918D, 158, 160; 166 N.W. 1073.

Great Northern Ry. Co. v. *Hocking Valley F.C. Co.*, 166 Wis. 465, 469.

Northern Pacific Ry. Co. v. *Pleasant River Granite Co.*, 116 Me. 496, 499.

Pennsylvania R. Co. v. *Townsend* (N.J.), 100 Atl. 855.

Miller &c. Co. v. *Atchison &c. Ry. Co.* (Tex. Civ. App.), 192 S.W. 354, 355.

New York Cent. R. Co. v. *Philadelphia & R. C. & I. Co.*, 286 Ill. 267; 121 N.E. 581.

B. & O. R. Co. v. *Luella Coal & Coke Co.*, 52 L.R.A. (N.S.) 398; 74 W. Va. 289; 81 S.E. 1044.

10 Corpus Juris, p. 445, sec. 699.

4 Ruling Case Law, p. 857, sec. 310.

Union Freight R.R. Co. v. *Winkley*, 38 Am. St. Rep. 398; 159 Mass. 123; 34 N.E. 91.

Central R.R. Co. v. *MacCartney*, 68 N.J. Law, 165, 171 (Mahlon Pitney, J.).

Chicago &c. Ry. Co. v. *Floyd* (Tex. Civ. App.), 161 S.W. 954, 956.

Keeling v. *Connally* (Tex. Civ. App.), 157 S.W. 232.

Atlas S.S. Co. v. *Colombian Land Co.*, 102 Fed. 358.

Portland &c. Co. v. *British &c. Ins. Co.*, 130 Fed. 860.

Central &c. Ry. Co. v. *Birmingham Sand & Brick Co.*, 9 Ala. App. 419, 423, 424.

Cincinnati &c. Ry. Co. v. *Saw Mill Co.*, 13 Ala. App. 442, 445.

Bewley-Darst Coal Co. v. *Railroad Co.*, 17 Ga. App. 464.

The point was exhaustively briefed in the State Supreme Court, that at Myrick, the point of shipment, the supply of coal produced exceeded the local demand; hence the price for coal at Myrick depended upon the market elsewhere, making allowance for freight (see 258 Fed. 905, 907). Therefore the shipper was damaged by the illegal rate exacted. But as this is not a Federal question, it becomes unnecessary to present the authorities bearing thereon in this Court.

In Brief IV, p. 22, plaintiff in error cites the rule applied by Interstate Commerce Commission in reparation claims under the long- and short-haul clause (section 4) of the Interstate Commerce Act. Such rulings are not binding on a State Court with respect to an intrastate transaction (see authorities on State Sovereignty, *ante*, pp. 52 *et seq.*).

In *Prey Bros. &c. Co.* v. *Railway Co.*, 40 I.C.C. 658, the Commission decided a rate in violation of the long-

and short-haul clause of Interstate Commerce Act to be unlawful to the extent of the excess charged for the shorter haul; that complainant has been damaged "to the extent that the charges paid exceeded the charges that would have accrued at the rate herein found lawful."

Milliken Ref. Co. v. *M., K. & T. Ry. Co.*, 37 I.C.C. 295.

Taffe v. *American Express Co.*, 37 I.C.C. 544.

Darragh Co. v. *Chicago &c. Ry. Co.*, 38 I.C.C. 549.

Advance Lumber Co. v. *Railway Co.*, 41 I.C.C. 384.

Plaintiff in error (Brief IV, p. 24) cites *Sharpless* v. *Lawrence*, 213 Fed. 423, an unfair-competition case (compare *Wolf Bros. & Co.* v. *Hamilton-Brown Shoe Co.*, 206 Fed. 611; 240 U.S. 251).

Plaintiff in error (Brief IV, p. 25) cites *Homestead Co.* v. *Electric Co.*, 226 Fed. 49, 53 (see opinion on appeal, 248 Fed. 439). The Court which decided the Homestead case (January 7, 1918) also decided the Spiller case, October 26, 1917 (246 Fed. 1). The Darnell-Taenzer case (245 U.S. 531) was decided January 21, 1918, resulting in a modification of the views of that Court, March 11, 1918, 249 Fed. 677 (see 253 U.S. 133).

The authorities cited by plaintiff in error (Brief IV, pp. 23-28; V, pp. 26-28) rely on *Penna. R.R. Co.* v. *Coal Co.*, 230 U.S. 184. The last-named case is also cited in *Atchison &c. Ry. Co.* v. *Spiller*, 246 Fed. 1, 17, 22 (reversed, *The Spiller Cases*, 253 U.S. 117); and by

the same Court in *Homestead Co.* v. *Des Moines Electric Co.*, 248 Fed. 439, 443.

Plaintiff in error also (Brief VI, pp. 28-30) dwells much on this case.

Penna. R.R. Co. v. *Coal Co., supra,* came to this Court on error to a United States Circuit Court of Appeals, as an action arising under the laws of the United States, the jurisdiction of the trial Court not being dependent on diversity of citizenship. The action was to recover "the difference between the rates paid by the plaintiff and lower rates resulting from rebates allowed other coal dealers making like shipments over the same road from the same point to the same destination." There was also a claim that the carrier "charged excessive freight for the transportation of plaintiff's coal . . ." (230 U.S. 185, 186). The case did not show any action of Interstate Commerce Commission with respect to the matters of which complaint was made.

It is pointed out (230 U.S. 197) that the statute on which that action was based made the carrier "liable to the person injured thereby for the full amount of damages sustained in consequence of any such violation . . ." (see also pp. 202, 203). The Commerce Act makes "a clear distinction between overcharge and damages . . . For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as an overcharge . . ." (230 U.S. 202).

It thus appears that in the exercise of its plenary jurisdiction this Court, in the case just cited, construed an Act of Congress to require specific proof of damage sustained before a recovery could be had. If this

Court had reached the contrary conclusion, it would not thereby have violated the Fifth Amendment to the Federal Constitution.

The Missouri Supreme Court has fixed the measure of damages in the case at bar at the difference between the greater rate for a shorter distance and the lesser rate for a longer distance.

> *McGrew* v. *Mo. Pac. Ry. Co.*, 230 Mo. 496, 547.
>
> See Record, pp. 32-37.

> ". . . a rate unlawful because of conflict with a valid constitutional provision is unreasonable."
>
> *Mo. South. R.R. Co.* v. *Public Service Commission* (Mo.), 214 S.W. 379, 381.

The Missouri Supreme Court, in the exercise of its plenary jurisdiction, had the same right to determine the measure of damages in a case arising under the Constitution of that State, as this Court has in a case arising under an Act of Congress.

> *Mo. Pac. Ry. Co.* v. *McGrew Coal Co.*, 244 U.S. 191.

The cases (*Mitchell Coal Co.* v. *Penna. R.R. Co.*, 230 U.S. 247, and *Penna. R.R. Co.* v. *Mitchell Coal Co.*, 238 U.S. 251) delineate the jurisdiction of this Court in a case arising under the laws of the United States and coming to this Court from a Federal Court, and a case arising under the laws of a State and coming to this Court from the Supreme Court of a State. In the first case (230 U.S. 247), arising under the Interstate Com-

merce Act, coming to this Court from a Federal District Court on the question of the jurisdiction of that Court, this Court followed *Penna. R.R. Co.* v. *International Coal Min. Co.*, 230 U.S. 184. In the second case (238 U.S. 251), arising under a State law, coming to this Court on writ of error to a State Court, this Court declined to interfere with the judgment of that Court awarding damages to a shipper because of rebates to another shipper without proof of special damage.

Mitchell Coal & Coke Co. v. *Pennsylvania R.R. Co.*, 241 Pa. 536.

Penna. R.R. Co. v. *International Coal Co.*, 230 U.S. 184, must be read in connection with—

Meeker & Co. v. *Lehigh Valley R.R. Co.*, 236 U.S. 412.

Mills & Co. v. *Lehigh Valley R.R. Co.*, 238 U.S. 473.

Southern Pacific Co. v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531.

The Spiller Cases, 253 U.S. 117.

In the Meeker case (236 U.S. 428) the finding of the Interstate Commerce Commission that the shipper was damaged to the excess of the unreasonable rate charged them, was judicially enforced. The same result obtained in the Mills (238 U.S. 473), the Darnell-Taenzer (245 U.S. 531), and the Spiller (253 U.S. 117) cases.

In Brief VI, p. 30, plaintiff in error quotes from *Penna. R.R. Co.* v. *International Co.*, 230 U.S. 184, and states that: "This Court instanced a case exactly like

the case at bar . . ." The Court said (230 U.S. 204): "But the plaintiff may have sold at the usual profit all or a part of its 40,000 tons at the regular market price, the purchaser, *on his own account*, paying freight to the point of delivery." But in the case at bar, the purchaser did not pay the freight to the point of delivery *"on his own account."* He paid the freight on account of the shipper who reimbursed him, thus giving the shipper the cause of action against the carrier otherwise vesting in the purchaser (Brief III, pp. 14-32).

Plaintiff in error cites *Lehigh Valley R.R. Co.* v. *American Hay Co.*, 219 Fed. 539, 541. That case, decided December 15, 1914, cites the Meeker case (211 Fed. 785), reversed February 23, 1915 (236 U.S. 412).

In Brief IV, p. 28, plaintiff in error attempts to distinguish *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U.S. 531, on the ground that, in the case at bar, the purchaser paid the excessive freight, being reimbursed therefor by the shipper. The same state of facts existed in the Darnell-Taenzer case (see 221 Fed. 894). It was contended in that case (Brief of Plaintiffs in Error, filed November 10, 1917, p. 7) that the shippers "were not damaged and did not bear the expenses of the alleged illegal excess in the rate condemned as unreasonable, but passed said excess on to their customers and consumers on the Pacific Coast—said latter parties not being parties to this case" (see also that brief, pp. 10, 28 *et seq.*, 48 *et seq.*). The point is covered in the brief of defendants in error in that case, filed December 1, 1917, pp. 9 *et seq.*; also in the memorandum filed on their behalf, January 11, 1918, pp. 3 *et seq.* So that the precise question at issue in this

case—the right of a shipper to recover of a carrier an illegal freight rate collected of a purchaser and reimbursed to him by the shipper—was before the Court in the Darnell-Taenzer case and stands decided.

IV.

THE CONTENTION OF PLAINTIFF IN ERROR AS TO THE ACTION OF MISSOURI PUBLIC SERVICE COMMISSION WITH RESPECT TO THE ACTS OF THE CARRIER ON WHICH THE RECOVERY IN THE CASE AT BAR IS BASED IS IMMATERIAL.

The contention—

(a) Is not a Federal question;

(b) Does not arise on the record in the case at bar;

(c) Is not well founded.

(*a*) In the case at bar a shipper recovered a judgment against a carrier in a State Court on account of a violation by the carrier of a self-executing provision in a State constitution. Whether such recovery violates an order of a State Public Service Commission is not a Federal question. The error assigned with respect to the question now under discussion is predicated of the equal-protection and due-process provisions of the Fourteenth Amendment (Rec. p. 112).

> "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable the United States Supreme Court to revise the decisions of the state courts upon questions of state law."
>
> 11 Fed. Stat. Ann. (2d ed.), p. 703.

As to "the equal protection of the laws": This clause simply requires that State legislation shall treat alike all persons brought under subjection to it. *Ib.*, p. 924.

The long- and short-haul clause of the Missouri Constitution has never been applied solely to Missouri Pacific Railway Company.

Missouri Southern R. Co. v. *Public Service Commission* (Mo.), 214 S.W. 379.
Independent Breweries Co. v. *Railway Co.*, 4 Mo. P.S.C. 620.

(*b*) At no place in the record in the case at bar does any claim of the character now under discussion appear prior to the filing of the motion for rehearing (Rec. p. 44). It was mentioned in a reply brief, but not considered by the Court (Rec. pp. 38-42).

"Points raised by appellant or plaintiff in error in his reply brief which were not presented in the opening brief will not as a general rule be considered."

2 Cyc. 1018, and cas. cit., note 92.
3 Corpus Juris, p. 1434, and cas. cit., note 32.
2 American Digest (2d Dec. ed.), p. 36, key number 762.
Simmons v. *Affolter*, 254 Mo. 163, 174.
Erdmann v. *United Railways*, 173 Mo. App. 98, 103.
Austin v. *Shoe Co.*, 176 Mo. App. 546, 557.

The State Court overruled the motion for rehearing

without opinion (Rec. p. 46). Hence no question arises thereon (Brief III, pp. 4, 5).

(*c*) Missouri Public Service Commission respects and enforces the Missouri Constitution, art. XII, sec. 12, as construed in the McGrew cases.

> *Independent Breweries Co.* v. *Railway Co.*, 4 Mo. P.S.C. 620.
> *Mooney* v. *Missouri Southern R.R. Co.*, 5 Mo. P.S.C. 250, 257.

It appears (4 Mo. P.S.C. 7) that Missouri Pacific Railway Company, after the decision in *McGrew* v. *Mo. Pac. Ry. Co.*, 230 Mo. 496, issued certain tariffs "containing *a general increase* in rates on soft coal between points in the State of Missouri" (4 Mo. P.S.C. 8).

It is true the Commission recognized that coal rates could not be fixed on a mileage basis, "but must be handled upon a zone or blanket basis" (p. 8). At the same time the law, as decided in the McGrew cases, was held applicable (p. 10). It was held: ". . . a railroad company may charge as much for hauling a car load of coal fifty miles as it charges for hauling another car load one hundred miles, but it cannot charge more for the fifty mile haul than it does for the one hundred mile haul" (4 Mo. P.S.C. 10).

V.

ON A WRIT OF ERROR TO REVIEW THE JUDGMENT OF A STATE COURT, THIS COURT DEALS WITH THE "FINAL JUDGMENT," UNDER SECTION 237, JUDICIAL CODE, AMENDED SEPTEMBER 6, 1916, NOT WITH DISSENTING OPINIONS.

The discussion by plaintiff in error (Brief V, pp. 33, 34) as to the dissentients in the McGrew cases in Missouri Supreme Court is wholly immaterial. This Court, under section 237, Judicial Code, amended September 6, 1916, deals with the final judgment, and does not undertake to sit as an umpire to decide as between conflicting views below.

Then, too, the judges below divided in *McGrew* v. *Mo. Pac. Ry. Co.*, 230 Mo. 496:

For Plaintiff: HALL, Special Judge, GANTT, VALLIANT, and LAMM, JJ.

For Defendant: BURGESS, FOX, and WOODSON, JJ.

But in *McGrew* v. *Railroad Co.*, 258 Mo. 23, the six judges sitting (LAMM, C.J., WOODSON, BROWN, BOND, WALKER, and FARIS, JJ.) unanimously upheld the judgment for plaintiff (see 258 Mo. 25).

In *McGrew* v. *Railroad Co.* (Mo. Sup.), 178 S.W. 1179 (affirmed, 244 U.S. 191), the six judges sitting (WOODSON, C.J., BROWN, BLAIR, BOND, WALKER, and FARIS, JJ., concurring), unanimously upheld the judgment for plaintiff (see 178 S.W. 1179).

(Under a local permissive statute, the last-named opinion was ordered "not to be officially reported.")

In *Missouri Southern R. Co.* v. *Public Service Commission* (Mo. Sup.), 214 S.W. 379, 381, the four judges sitting (BLAIR, P.J., WOODSON, BOND, and GRAVES, JJ.), followed the McGrew cases, *supra*.

In the case at bar, four judges (WALKER, C.J., BLAIR, WILLIAMS, and WILLIAMSON, JJ.) voted for affirmance of the judgment in favor of plaintiff below; WOODSON and GOODE, JJ., dissenting (Rec. pp. 38-42). The record does not disclose whether the last-named dissenting judges disagreed from the earlier McGrew cases, or whether they dissented on the ground that the consignee, not the consignor, paid the freight.

So the record stands:

In favor of upholding the Missouri constitutional provision as valid and self-enforcing:
HALL, Special Judge, GANTT, VALLIANT, LAMM (twice), WOODSON (three times), BROWN (twice), BOND (three times), FARIS (twice), WALKER (three times), BLAIR, (three times), WILLIAMS, and WILLIAMSON, JJ.
Contra: BURGESS, FOX, WOODSON (twice), and GOODE, JJ.
Not sitting: GRAVES (four times), concurring through obedience to weight of authority once.

In conclusion:

The writ of error should be dismissed for want of jurisdiction; or, judgment affirmed.

EDWIN A. KRAUTHOFF,
Attorney for Defendant in Error.

Z. LEWIS DALBY,
WILLIAM S. MCCLINTOCK,
ARTHUR L. QUANT,
Of Counsel.

ADDENDA.

Missouri Pacific Railway Company claims that, because intrastate freight is hauled in the same train with interstate freight, the former becomes the latter. Carried to its logical conclusion, this would mean that the company named has become exclusively an interstate carrier; for it is difficult to conceive of a train limited to intrastate freight. The theory now advanced is very recent in its discovery. It was not urged by the company named in *Mo. Pac. Ry. Co.* v. *Tucker*, 230 U.S. 340, nor in *Missouri Rate Cases*, 230 U.S. 474, 509, to which it was a party.

In *Mo. Pac. Ry. Co.* v. *Brinkmeier*, 77 Kan. 14, 23, it was held that the petition failed to allege "that the car which caused the injury was being used in moving interstate traffic" (see 81 Kan. 101; 224 U.S. 268). This ruling clearly recognizes that the carrier named is not exclusively an interstate carrier.

In the *Minnesota Rate Cases*, 230 U.S. 401, it is stated that on the hearing of *Smyth* v. *Ames*, 169 U.S. 466: "It was argued that the local traffic was carried over the same tracks, in the same trains, and often in the same cars with the interstate traffic" (230 U.S. 425, 426). The "local traffic" was nevertheless characterized as "intrastate."

In *Southern Ry. Co.* v. *Railroad Commission*, 236 U.S. 439, it was claimed that a single intrastate car contained in a train consisting also of interstate cars violated a State Safety Appliance Act. Learned counsel for the carrier referred to this car as "moving intrastate traffic on a railroad engaged in interstate commerce." This Court said (236 U.S. 445): "The

car alleged to have been without the required equipment, through transporting freight between points wholly within the State of Indiana, was moving on a railroad engaged in interstate commerce."

In *Toledo &c. R.R. Co.* v. *Slavis*, 236 U.S. 454, learned counsel for the carrier referred to the cars on the train on which the employee injured was riding: ". . . with a few exceptions, they [the cars], were engaged in interstate commerce."

In *United States* v. *Railroad Co.*, 174 Fed. 638, 640, reference is made to a car being hauled between intrastate points; "it being part of a train engaged in interstate traffic."

In *Wabash R. Co.* v. *United States*, 168 Fed. 1, 4, reference is made to a car "laden with intrastate traffic," being "hauled in connection with interstate cars on an interstate line."

In *Reed* v. *Director General* (Pa.), 110 Atl. 254, reference is made to a train: "Some of the cars contained goods shipped in interstate commerce."

It is evident from the Federal Safety Appliance and Employers' Liability Cases that no one has ever supposed that cars laden with intrastate commerce, like a chameleon, are colored by juxtaposition and converted into interstate commerce through becoming a part of an interstate train or hauled by an interstate carrier.

The Federal Safety Appliance Act applies to *railroads* engaged in interstate commerce; the Federal Employers' Liability Act applies to *carriers and employees* likewise engaged. But as to rates, the Interstate Commerce Act applies only to *interstate commerce, freight and passenger.*

"When freight actually starts in the course of transportation from one State to another, it becomes a part of interstate commerce."

Ill. Cent. R.R. Co. v. *Fuentes*, 236 U.S. 157, 163.

The statement of plaintiff in error (Brief V, p. 20):

"The same hauls, therefore, in which plaintiff's coal was transported involved interstate hauls, and on such interstate hauls from Myrick, Missouri, for example, to a point in the State of Kansas, the interstate shipper was charged and paid the same rate on the portion of the haul from Myrick to Independence, Missouri, that the consignee of the McGrew Coal Company paid on its haul from Myrick to Independence en route to its final destination";

is wholly unsupported by the record in the case at bar.

In the following cases, a writ of error to the highest Court of a State was dismissed for want of jurisdiction under section 237, Judicial Code, as amended September 6, 1916:

Jones v. *Hiltscher*, 251 U.S. 545; judgment of the State Court claimed to violate Fourteenth Amendment.

Mo. Pac. R.R. Co. v. *Bellis*, 251 U.S. 538; claim that State Court failed to give full faith and credit to judgment of Federal Court.

Twohy v. *Doran*, 251 U.S. 541; State taxation claimed to violate Fourteenth Amendment.

In the following cases writs of certiorari to the highest Court of a State have been granted:

Seaboard Air Line Ry. Co. v. *Gray*, 248 U.S. 557; injury to interstate shipment.

Philadelphia &c. Ry. Co. v. *Smith*, 253 U.S. 481; 110 Atl. 142; Federal Employers' Liability Act.

Mich. Cent. R.R. Co. v. *Owen*, 253 U.S. 481; 291 Ill. 149; 125 N.E. 767; interstate bill of lading.

New York &c. R.R. Co. v. *York & Whitney Co.*, 253 U.S. 478; 230 Mass. 206; action to recover interstate freight charges.

Pullman Co. v. *State Industrial Comm.*, 41 Sup. Ct. 9; *Western Union Tel. Co.* v. *Boston*, 253 U.S. 480; defense federal control.

Missouri &c. Ry. Co. v. *Zuber*, 251 U.S. 549; plaintiff injured while riding on interstate pass.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
McGREW COAL COMPANY,
Defendant in Error.
No. 265.

In Error to the Supreme Court of the State of Missouri.

SEPARATE, SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

EDWARD J. WHITE,
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St. Louis Law Printing Co., 415 N. Eighth St. Bell, Main 1819.

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SEPARATE, SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

I.

This case presents but another phase of the century-old controversy between the National Government and a State arising from the State's claim that it can penalize an interstate carrier, under the guise

of its police power, for doing or failing to do what the Federal Government has held to be no violation of law.

The issue is not presented in the old form that it was by the states at the time that McCulloch v. Maryland (4 Wheat.) was written, by a denial of the power of the National Government over interstate commerce, since it is now an accepted fact that the power of the National Government cannot be negatived by the state governments, the Constitution having granted to the National Government powers which bind the state sovereignties.

McCulloch v. Maryland, 4 Wheat. 400-402-403.

In the light of this decision, as it comes to us through the years, it seems strange that this power should ever have been denied in the face of the provision in our organic law providing that the Constitution should be the supreme law of the land and requiring all state officers to "take the oath of fidelity to it".

McCulloch v. Maryland, 4 Wheat. 405-406.

It is no longer doubted that the National Government having been given the power to regulate commerce, has all the incidental powers to facilitate the execution of this grant, since, as observed by Chief

Justice Marshall, it cannot be presumed to have been the intention to

> "Clog and embarrass its execution by withholding the most appropriate means".

It is now nowhere gainsaid that the Government acts in this power for all the states, since these powers were delegated by all and that it represents all, and no state can directly control the exercise of these powers by the National Government, but that, in the regulation of commerce, the Nation binds all the component parts thereof.

But, while not denying the absolute power of the Federal Government to bind the different states in its regulatory processes, this case, in another form, is an attempt to negative the power of the general Government in the regulation of commerce, since it asserts a right to assess a penalty upon the movement of intrastate commerce by a long and short-haul provision which is different entirely from that obtaining against interstate commerce, and which, to this extent, regulates the movement of interstate commerce.

As observed by Chief Justice Marhall, in **McCulloch v. Maryland,** where the States attempted to penalize, tax and regulate the internal affairs of a federal, incorporated bank,

"The baneful influence of this narrow construction on all the operations of the Government and the absolute impracticability of maintaining it without rendering the Government incompetent to its great objects might be illustrated by numerous examples drawn from the Constitution and from our laws. The good sense of the public has pronounced without hesitation that the power of punishment pertains to sovereignty and may be exercised whenever the sovereign has a right to act as incidental to its constitutional powers. It is a means for carrying into execution all sovereign powers and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise."

McCulloch v. Maryland, 4 Wheat. 417-418.

The application of this principle would clearly prevent a given State from penalizing an interstate carrier upon a different standard or for acts which could not be penalized under the regulatory provisions adopted by the National Government—yet that is exactly what we have in this case.

The State does not gainsay the exclusive, paramount authority of the Government, but, by a different standard, it attempts to penalize acts which the National Government has said were perfectly legal and proper.

The National Government is responsible for the

earnings and possesses exclusive jurisdiction over the subject-matter, yet, under the guise of an exclusive intrastate regulation, the State adopts a different standard and penalizes what would be a legitimate rate structure as to commerce moving between the States.

At the time that our Constitution was being vitalized by this Court, under the leadership of Chief Justice Marshall, the great patriot lawyer who breathed the life into this immortal document, the principle was laid down that

> "In all commercial relations, we are one and the same people."
>
> Cohens v. Virginia, 6 Wheat. 266, 267, 268 and 290.

But, with the gradual assertion by the several States of a sovereign right to regulate intrastate commercial transactions, with the processes of the years, the inconsistent condition grew up that, as to all intrastate transactions, the States were supreme, and that a different, inconsistent regulatory process could exist without any relation to the regulation by the National Government.

This fiction is responsible for conditions like we find in the present case, where a sovereign State, under the claim of sovereignty, prescribes a different rule of conduct against an interstate carrier and pen-

alizes within the borders of its State what would otherwise be a legitimate, proper rule for the interstate carrier.

The fallacy of the plaintiff's contention, that each State in the Union can provide a different tribunal and a different rule of conduct for an interstate carrier as to intrastate commercial transactions, would set aside the Constitution of the United States and the paramount power of Congress, since by such a rule, as observed by Chief Justice Marshall,

> "The Constitution, laws and treaties may receive as many constructions as there are States."

Cohens v. Virginia, 6 Wheat. 375-377.

As in the **Cohens** case, different States could assess the different fines and penalties, and, if such doctrine is to apply, as observed by the Court in the **Cohens** case:

> "Every other branch of Federal authority might as well be surrendered. To part with this, leaves the Union a mere league or confederacy."

Cohens v. Virginia, 6 Wheat. 354.

As, in the attitude of Virginia toward the Federal Government's authority in the **Cohens** case, so, if the attitude of Missouri in this case can be justified, it leaves the National Government prostrated

> "At the feet of every State in the Union. * * * Each member will possess a veto on the will of the whole."
>
> Cohens v. Virginia, 6 Wheat. 384-387.

The baneful effect of a deviation from these landmarks has been illustrated in the case of the agencies of interstate commerce in our present day; under the conflicting rgeulations of the forty-seven different States, as opposed to those of the National Government, we have seen our transportation agencies break down and the Government, itself, during the recent war, was compelled to take over these agencies and operate them in order that one rule could obtain, and that our governmental agencies of transportation could be efficiently operated during the war. Since this time, Congress has declared what this Court had already declared: that the authority of the Interstate Commerce Commission was supreme over these interstate agencies of transportation.

How can the authority of Congress and the Interstate Commerce Commission be held to be supreme if the judgment in this case can run the gauntlet of this court?

In

> Cohens v. Virginia, 6 Wheat. 384,

this Court

> "Stamped upon the brow of Localism the brand of illegality".

It laid down the fundamental doctrine that, under the commerce power, the National Government was not able to preserve itself against a section of the nation, acting in opposition to the general will.

Cohens v. Virginia, 6 Wheat. 389-390.

Under this salutary doctrine, where commerce that, in its very nature, is interstate and where the practice of an interstate agency is involved, there should be stamped upon all localism in regulation the brand of illegality, or, otherwise, the National Government is not supreme, and, to the extent that penalties are allowed under a different, local regulation, inconsistent with the supreme national regulation, the power of the National Government is superseded by the local, inconsistent State regulation.

It is a well-known fact that the want of authority in Congress to regulate commerce had produced a foreign, monopolizing policy, injurious to the trade of the United States, and the absence of a general power over commerce had led to the exercise of a separate power by the States which not only proved abortive, but also engendered inconsistent regulations, and that this was the prime reason for the granting to Congress of an exclusive, paramount authority over commerce.

Farrend's "Records of Federal Convention", Vol. III, p. 547.

See, also,

Gibbons v. Ogden, 9 Wheat. 192-193.

As explained in **Gibbons v. Ogden**, the proper construction of the commerce clause of the Constitution was that the commerce which the National Government was given the exclusive power to regulate meant commerce intermingled with the different states, so

> "Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior".

The power to regulate this commerce

> "Must be exercised whenever the subject exists. If it exists within a state, if a foreign voyage may commence or terminate within a state, then the power of Congress may be exercised within a state".

Gibbons v. Ogden, 9 Wheat. 195.

Can it be doubted that an inconsistent, penal regulation by one state as to intrastate commerce, which necessarily affects the rates upon the same commodities moving interstate, is at variance with the exclusive power of Congress and the Interstate Commerce Commission over this commodity, which must be hauled by the interstate carrier under a rate

structure depending upon the penal provision of the individual state?

Justice Johnson, in his opinion in the **Gibbons** case, went even further than Chief Justice Marshall when he declared for the principle that

> "If there was any one object riding over any other in the adoption of the Constitution, it was to keep the commercial intercourse between the states free from all invidious and partial restraints."
>
> Gibbons v. Ogden, 9 Wheat. 231-232.

If these salutary principles had been adhered to through the past century, and different, conflicting, inconsistent, state regulations of the agencies of interstate commerce had not been allowed, it might not have been necessary for the National Government to have taken over these agencies in order to render them more efficient during the recent war.

We say this because, with the regularity of the seasons, the complainant in this case, McGrew, has been recovering damages under what is known as the long- and short-haul clause of the Missouri Constitution of 1875 (Section 12, Article XII), although no such damages could be recovered under the Act to Regulate Commerce on interstate shipments. See

McGrew v. Mo. Pac. Ry. Co., 114 Mo.,

decided in February, 1893, down to and including

McGrew v. Mo. Pac. R. R. Co., 230 Mo. 496,

and this present case, to wit:

McGrew v. Mo. Pac. R. R. Co., 217 S. W. 984.

In the case of

Sloan v. Pacific R. R., 61 Mo. 24,

the Act of 1872—upon which plaintiff McGrew always bases his damage suits in his petition, and then as regularly abandons his petition to recover under the Constitution—was held unconstitutional; and the Illinois statute, from which it was patterned, was also held unconstitutional.

C. & A. R. R. v. People, 67 Ill. 11.

Following these judicial interpretations, within a few months thereafter, the Constitutional Convention of Missouri, on November 30, 1875, clearly intended to retain the principle of these long and short-haul statutes (Section 12, Article XII of the Constitution), providing for the principle against charging more for a shorter than for a longer haul, and providing in the same section:

> "And suitable laws shall be passed by the General Assembly to enforce this provision."

Notwithstanding this mandatory language in this section of the Constitution, to **require the Legislature**

to pass suitable laws, after pointing out this provision of our Constitution, the special Judge whom it was necessary for the Supreme Court of Missouri to appoint to reach a decision in the case of

McGrew v. Missouri Pac. R. R. Co., 230 Mo. 531,

said:

> "The effect of making the short-haul rule a part of our Constitution was to exclude the construction by the Illinois Supreme Court of the Illinois Constitution borrowed by us."

This, notwithstanding our Supreme Court, in

Sloan v. Ry., 61 Mo. 24,

had following the same construction as that placed upon a similar statute by the Supreme Court of Illinois.

It may be observed in passing that no stronger evidence could have been furnished by the framers of the Missouri Constitution that they did not intend the long and short-haul rule to be a hard and fast rule, self-enforcing, than by incorporating in the section of the Constitution the mandatory direction to the General Assembly, while preserving the principle, to do so by adopting "suitable laws" necessary to enforce it.

The Missouri General Assembly has repeatedly passed laws regulating and preventing discrimina-

tions, which accord with the Federal provisions, and which the Supreme Court has ignored because out of line with the assumed self-enforcing provisions of Section 12, Article XII of the Constitution.

The Public Service Commission Law of Missouri of 1913 gave the Commission, as the representative of the Legislature, complete jurisdiction of the subject of rates. Under this law the Public Service Commission has approved, and permits the Missouri Pacific to exact, the rates on the longer hauls where, because of competitive conditions, it is required to charge less than on the shorter hauls, and this presents the anomalous result that it is, nevertheless, penalized under this interpretation of the State Constitution because it does exact the lawful, Commission-made rates, which are held to be counter to the intent of Section 12, Article XII of the Constitution, only because held to be self-enforcing; and thus the Missouri Pacific is, from year to year, required to discriminate against the other shippers of the State, and pay large semiannual judgments to the plaintiff, McGrew, because he, as the only citizen of the State who attempts to enforce this so-called long and short-haul provision, as interpreted by the Missouri Supreme Court, as frequently recovers his periodical judgments based only upon the fact that this carrier has exacted the rates which the Commission has required it to exact in order to give the shippers of

the State the benefit of competing lines on long-haul business.

That this interpretation of the Missouri Constitution is discriminatory, although the business moves wholly intrastate, is within the principle and adjudications of the unbroken line of decisions of this Court.

The anti-pass provision of the Hepburn Act of 1906 has been held by this Court to apply as well to transportation wholly within a state as to transportation without a state, since this gives the intrastate shipper a clear preference over the interstate shipper.

New York Central v. Gray, 239 U. S. 583.

In the case of

Phillips v. Grand Trunk, 236 U. S. 667,

this Court held:

> "The prohibitions of the statutes against unjust discrimination relate, not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier."

This Court and the Interstate Commerce Commission have uniformly held that the waiver of the plea of the statute of limitations is a discrimination and a preference because all devices by which such re-

sults may be accomplished are prohibited by the Federal statute.

This Court has held that a concession to a State shipper, in the granting of a lower State rate than an interstate rate, is illegal and discriminatory.

> Houston E. & W. Texas Central Ry. v. U. S., 234 U. S. 342.

And delegating to the Interstate Commerce Commission the regulation of purely State rates, to prevent discrimination with interstate rates, has been properly held in Congress under this grant of power, and, under this paramount power, Congress can also prevent the use of instrumentalities of intrastate commerce to the prejudice of commerce between the States.

> Houston E. & W. Texas Ry. v. U. S., 234 U. S. 342.

This paramount power of regulation has been held to include both the instrumentalities by which the commerce is carried on and the employes and the cars.

> Interstate Com. Comm'n v. Ill. Central R. R., 215 U. S. 452.

That the Missouri constitutional long and short haul provision, as construed by the Supreme Court of the State, is diametrically opposed to the Federal

long and short haul provision is apparent from a consideration of the decision by Justice Brandeis in the recent case of

Skinner & Eddy Corporation v. U. S., 249 U. S. 557,

as this decision clearly shows the intent of the amendment of the Interstate Commerce Act of 1910, in leaving to the Interstate Commerce Commission exclusive control of such discriminations. In this case, the Court observed:

> "The specific purpose of section 4 was to prevent discrimination by charging less for the longer haul, unless, in the opinion of the Commission, the circumstances make such action just. Discrimination, just, when sanctioned, may become most unjust. Recognizing this fact, Congress provided that the judgment of the Commission should be exercised 'from time to time' to determine the extent to which the carrier may be relieved from the operation of this section. * * * The specific purpose of the last paragraph of section 4 is to insure and preserve water competition; to prevent competition that kills. * * * And, in order to preserve competition between rail and water carriers, it is necessary that the Commission's power to approve a modification of rates be as broad as it is to approve a modification in order to prevent unjust discrimination."

We submit that it is an anomaly in the law, in view of the exclusive power of Congress over interstate

commerce as applied to a variety of conditions and instrumentalities, that, with the sanction of one State, an interstate carrier can thus be penalized for exacting a lower rate on a longer haul to meet competitive conditions when the shipment moves interstate, but that the carrier must thus periodically be subjected to a penalty for doing the same thing, although approved by the State Commission under such an inconsistent construction of a State Constitution, and thus compelled, against its will, to discriminate in favor of a shipment moving intrastate as against a similar shipment moving interstate.

We submit that a reasonable interpretation would be that, when Congress has prescribed and authorized the Interstate Commerce Commission to prescribe the difference in rates for shipments moving over long and short hauls to meet competitive conditions, this should be held exclusive, and all attempts by the States to establish different rules and to exact penalties upon shipments moving under the same or similar conditions should be held to be discriminatory; in other words, all such State legislation to prevent discrimination over the same subject matter should yield to the paramount authority of Congress and the Interstate Commerce Commission.

Spokane R. R. Co. v. Campbell, 241 U. S. 497.

To meet competitive conditions, as stated by the Supreme Court time and again in the decisions in the McGrew cases—and the facts being such that this Court will take judicial notice thereof—since the Missouri Pacific is seventy-six miles longer to Joplin, Missouri, and Pittsburg, Kansas, and points in the Kansas lead-smelting section than the Frisco, from St. Louis, to serve the people of that section of Missouri and Kansas, and receive any of the competitive Illinois coal moving to those sections, it must compete with the rate of the Frisco Road; indeed, this rate is approved by the State Commission, and, under the State Commission Law, it is a legal, valid rate, and the only rate which it can charge for these longer-haul shipments.

The statement of the proposition that it should be compelled to go out of this competitive business or reduce its Myrick rates to meet these other rates illustrates the anomaly which these cases afford as a result of permitting the State of Missouri to have and enforce a penal provision of its Constitution, thus directly affecting interstate commerce.

As observed by Justice Peckham, of this court, in the case of

L. & N. R. R. v. Eubank, 184 U. S. 34,

as to a similar provision of the Kentucky Constitution:

"The contention is that a State does not prescribe or regulate the rates outside its borders; that the Company may announce and enforce any rate it pleases regarding interstate commerce. It simply directs that between points within the State of Kentucky the charge shall not be greater for a shorter haul than for a longer haul, even though such longer haul may be between a point outside and one inside the State; that this does not constitute an interference with, or a regulation by the State of, interstate commerce, and, hence, the provision is valid. * * * But is it correct? And is there no such immediate influence upon or regulation of the interstate commerce of the defendant? * * * The result of the construction of this provision by the court below is, in effect, to prohibit the carrier from making a less charge for the transportation from Nashville to Louisville than from Franklin to Louisville, or else to make a charge that will prevent its doing any business between the States in the carrying of tobacco. The necessary result of the provision, under the circumstances set up in the answer, directly affects interstate rates, or, in other words, directly affects interstate commerce, for it directly affects commerce between Nashville and Louisville. The fact is not altered by putting the proposition in another form, and saying that the constitutional provision only prevents the carrier from charging a greater sum for the shorter distance from Franklin to Louisville, both within the State, unless the consent of the Railroad Commission is obtained, because, in

either event, the charge from Nashville to Louisville enters into and forms a part of the real subject matter of the provision, the greater sum for the shorter distance within the State being compared with the lesser sum for the longer distance without the State. * * * And in this case, in order to maintain its State rate, it must fix its interstate rate at an amount which prohibits its doing interstate business."

L. & N. R. R. v. Eubank, 184 U. S. 34-36.

This condition applies absolutely to the Missouri Pacific in this case, and, if it must make the greater rate for the shorter haul on coal moving to Myrick apply on coal moving from the Illinois field to Southwestern Missouri and Southeastern Kansas points, since it has the longer line to these points than its competitors, it would have to go out of the business on coal between these points entirely.

To this effect, Section 12, Article XII, of the Missouri Constitution, as construed by the Supreme Court of Missouri, in its divided opinions in these cases, is identical with the Kentucky constitutional provision construed by Justice Peckham in the **Louisville & Nashville** case, and to such extent it is identical with the Illinois long and short haul law, which had been held unconstitutional by the Illinois Supreme Court, and was held by Justice Miller of this Court to be invalid as applied to the Wabash

Railway Company, because it directly affected its interstate rates or compelled it to go out of the interstate business. See the exhaustive opinion in the case of

Wabash Ry. Co. v. Illinois, 118 U. S. 572-575-577.

As observed by Chief Justice Marshall in

Gibbons v. Ogden, 9 Wheat. 1:

"The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be in any manner connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.' It may, of consequence, pass the jurisdictional line of New York and act upon the very waters (the Hudson River) to which the prohibition now under consideration applies."

Gibbons v. Ogden, 9 Wheat. 9.

The great Chief Justice, in this early landmark in our jurisprudence, construed the Federal Constitution in the only way which would make the regulation of commerce by Congress effective, i. e., in holding that its power was exclusive and paramount to that of the different States. He demonstrated that commerce among the States, like commerce among foreign nations, is necessarily a commerce which crosses State lines and extends into the States, and the power

of Congress to regulate it exists whenever that commerce is found.

The Missouri Constitution clearly applies to long and short hauls beginning or terminating without as well as within the State, and, to this extent, its influence upon the interstate rates of the Missouri carriers is as pronounced as that of the Kentucky Constitution construed by Justice Peckham in the **Louisville & Nashville** case.

In the case of

Welton v. Missouri, 91 Mo. 275,

this Court said:

> "It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general Government was to insure its uniformity against discriminating State legislation."

Justice Miller, in the **Wabash** case, said:

> "We must, therefore, hold that it is not, and never has been, the deliberate opinion of the majority of this Court that a statute of a State which attempts to regulate the fares and charges of railroad companies within its limits for a

transportation which constitutes a part of commerce among the States, is a valid law."

Wabash Ry. Co. v. Illinois, 118 U. S. 575.

A better illustration of the necessity of such a uniform regulation could not be found than this case affords. For the past twenty years, at regular intervals, the complainant in this case has regularly required forced, discriminatory payments through the courts of Missouri, which no other shippers in the State have received, because, perchance, it could better afford to pay such judgments than to entirely go out of all interstate business upon coal moving from the Illinois fields to Southwest Missouri and Southeastern Kansas points, which business it could alone handle, because of competitive conditions, by exacting a lower rate than it charges for the shorter haul to Myrick and from there to Kansas City.

It is now well settled that, in order to establish uniformity in regulation and prevent discriminations, the Interstate Commerce Commission has jurisdiction to establish both the state as well as the interstate rates.

In the recent

Memphis Southwestern Investigation,
(36 I. C. C. Rep. 515),

the Interstate Commerce Commission established a maximum of class rates on shipments moving from

St. Louis to Southeastern Missouri points, as well as class rates upon business confined to the State of Arkansas, the Commission, in the course of its opinion, observing:

> "The evidence shows that, in order to secure equal and uniform treatment for interstate commerce, the uniform scale should cover the whole State of Arkansas for interstate and intrastate commerce, and that the same scale must, in order to avoid undue inequalities, be extended to adjacent territory in some of the adjoining states."

The Commission, in this same case, likewise applied a scale of class rates confined wholly to intrastate traffic moving in Missouri, in the course of its opinion, observing:

> "Southern Missouri, as the expression is used in this report, refers to what is known as 'B' territory, being the portion of the State, roughly speaking, lying south of the Missouri River. * * *
>
> "That the traffic conditions are different in the territory north of the Missouri River is indicated by the fact that the density of Missouri, as a whole, is 1,044,984; for Iowa, 808,880, and for Minnesota, 1,181,069. * * *
>
> "The evidence indicates that Arkansas, Oklahoma and Southern Missouri are a homogeneous rate region, and that transportation conditions would seem to dictate, in general, the observance therein of a uniform distance scale. * * *
>
> "Summarizing, we may say: First, that the

Shreveport scale, with bridge tolls added, would substantially reduce interstate class rates for short distances between Memphis and Arkansas points, upon which a substantial volume of traffic has moved; it would also reduce rates on the higher classes from St. Louis and Memphis for the longer hauls to Southern Arkansas and Oklahoma, thus tending to break down the adjustment of rates from Mississippi crossings to Texas, and it would increase materially the intrastate rates and jobbers' rates, upon which considerable traffic has moved. * * *

"It is indisputable that the influence of the Mississippi and Missouri Rivers has affected the Kansas City-Memphis rates, and that similar influences have not been operative as between St. Louis and Texarkana. * * *

"This relationship is alleged to constitute an essential point in the general rate adjustment, east and westbound, involving particularly Western Trunk Line territory. * * *

"We find that the class rates set out in Appendix No. 1 to this report are, for distances not in excess of 350 miles, except as otherwise indicated, reasonable maximum rates for interstate application (a) between points in the State of Arkansas and points in the State of Missouri, located in what is commonly known and designated as 'B' territory."

Considering the Missouri intrastate structure, the Commission said:

"The rates from St. Louis, moreover, to points in Southeastern Missouri are so much lower than the corresponding rates from St. Louis to points in Arkansas, that there is a sudden jump in the rates when the State line is crossed. * * * The evidence plainly shows that the rates from St. Louis to points in Southeastern Missouri are on an unduly low basis."

The Commission then proceeds to put in a class rate applicable to purely intrastate business in Missouri in order to prevent discrimination against the interstate rate.

The discriminatory character of intrastate class rates in Arkansas was before the Commission in the case of

Memphis v. C., R. I. & P. Ry. Co., 39 I. C. C. Rep. 256,

in which it was held that the class rates between Memphis and points in Eastern Arkansas were unduly prejudicial to Memphis to the extent that they exceeded, together with reasonable bridge tolls, the corresponding rate contemporaneously applicable to Arkansas intrastate traffic.

We thus find that, in pursuance to the constitutional power vested in Congress, there is delegated to the Commission the exclusive function of regulating rates and preventing discriminations upon the part of carriers, and that this is held to include, not

only interstate, but also intrastate rates as well.

With this condition existing, how can the State of Missouri attempt to authorize, under the guise of a self-enforcing constitutional long and short-haul provision, such a continuous and exorbitant discriminatory practice as the record in this case and in other cases brought by McGrew shows to exist, and which has grown up and been fostered and continued upon the theory that Missouri, by this constitutional provision, has erected a Chinese wall around the State, and as to this peculiar traffic, there is no relation to the traffic moving between the states which this Court and the Interstate Commerce Commission has held it is the exclusive business of the Interstate Commerce Commission to regulate?

When the Commission assumes authority to regulate and prevent discriminations between intrastate traffic moving from St. Louis to Southeastern Missouri, wholly within the State of Missouri, why should its jurisdiction be not likewise exclusive in the regulation of traffic moving to Southwestern Missouri?

If it has such jurisdiction, then the State is without jurisdiction as to this same subject-matter and this conflict between the two jurisdictions should cease.

II.

The record in this case also emphasizes the necessity of Federal regulation upon the right of the plaintiff to recover alleged damages in this case, since it shows that, in the face of the ruling of this Court in the case of

Penna. R. R. Co. v. Coal Co., 230 U. S. 184,

by agreed statement of facts and solemn admission of the plaintiff that he had not paid the rates upon the shipments of coal upon which he sought to recover damages, but that the freight had been paid by the consignee, he was, nevertheless, permitted to recover damages as though he, himself, had paid the tariff rate which the consignee had paid.

In the case of

Penna. R. R. Co. v. Coal Co., 230 U. S. 184,

the plaintiff, as in this case, sued for damages resulting from an alleged discrimination, but he was denied a recovery because he had not paid the freight, the Court, speaking through Justice Lamar, observing:

> "Under the statute, there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and

> calls for an exercise of the discretion of the administrative and rate-regulating body",

and, adverting to the fact that the plaintiff, itself, had not paid the discriminatory rates, the Court said:

> "But, although this suit was brought to enforce a cause of action given by this section to any person injured, it is a noticeable fact that, in its pleading, the plaintiff does not claim to have been damaged, and there is neither allegation nor proof that he suffered any injury."

The Court then cites many cases which were relied upon by the plaintiff, many of which are cited in this case, with the conclusion that they

> "do not support the proposition that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination."

This Court, in the **Pennsylvania** case, then distinguished the many cases relied on by the plaintiff in this case between overcharges and damages, and the Court said:

> "If the plaintiff here had been required to pay more than the tariff rate, it could have recovered the excess, not as damages, but as overcharge. • • • Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion.
>
> • • • • • • •

"It is elementary that, in a suit at law, both the fact and the amount of damage must be proved. And, although the plaintiff insists that, in all cases like this, the fact and the amount of pecuniary loss is matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience."

This Court then instanced a case exactly like the case at bar, and concludes that, in that case, where the consignee, instead of the shipper, pays the freight, only the consignee could sue. The Court said:

"But the plaintiff may have sold at the usual profit all or a part of its 40,000 tons at the regular market price, the purchaser, on his own account, paying freight to the point of delivery. **In that event, not the shipper, but the purchaser who paid the freight, would have been the person injured if any damages resulted from giving rebates.** To say that seller and buyer, shipper and consignee, could both recover would mean that damages had been awarded to two where only one had suffered."

Penna. R. R. v. Coal Co., 230 U. S. 204.

Thus it is that we find the plaintiff in this case, under a stipulation which would clearly prevent a recovery of damages according to the rule of law announced by this Court, upholding a judgment for damages upon which this Court has denominated a fictitious or erroneous theory, and this against a car-

rier, who, by established law, is not permitted, directly or indirectly, to discriminate or pay its shippers who have not been damaged, since this is a rebate or preference and a discrimination against all of its other shippers.

As to all interstate commerce transactions, the unbroken line of decisions of this Court is to the effect that, when Congress has acted, its jurisdiction is paramount and exclusive.

Congress has clearly delegated to the Interstate Commerce Commission authority to prevent discriminations, and it has assumed jurisdiction to act, and this Court has held that its authority is exclusive in both classes of commerce, whereas, in this case, the effect of the recovery of a penalty upon intrastate commerce is to influence or prejudice interstate commerce.

The authority could not be co-existent and, at the same time, exclusive in both State and National Government.

The Constitution of the United States, in delegating to Congress the power to regulate commerce, as the highest expression of the will of the people of our country, intended that this authority should be exclusive and paramount, and, where, as in this case, the effect of a penalty imposed under the law of a State is to discriminate against or in any manner af-

fect interstate commerce, such penalty should be held invalid as it was held by this Court in the **Illinois** and **Kentucky** cases above referred to. And, in any event, in a case where this Court has regularly acquired jurisdiction, under an affirmative claim that a litigant's property has been taken from it without due process of law, under the Federal Constitution—and this by an interstate carrier, who is jealously prevented from discriminating in any manner among its shippers—in a case where a shipper is allowed to recover by way of damages a judgment which this Court has held could not be legally recovered, if it would prevent the recovery by way of damages of rebates and discriminatory charges where no basis in law for such recoveries exists, it must prevent such abuses and retain a regulatory supervision over the courts of the different states, if the constitutional power of Congress to regulate commerce and the incidental power of the Commission to prevent discriminations are to be upheld.

To the end, therefore, that there may be uniformity in the regulation of commerce between the States and intrastate, by one paramount authority, and that discriminatory rebates and practices cannot be upheld either under the guise of law or when authorized by the decision of the highest court of the State, in the face of a solemn precedent established by this court as to a subject matter upon which its deliberations

should be followed, we submit that the judgment of the Supreme Court of Missouri in this case should be reversed, and, upon the facts shown by the record in this case, the plaintiff should be adjudged without a valid cause of action against the defendant either under the Missouri Constitution or the Statute of Missouri, upon which he predicated a right of recovery and then voluntarily abandoned before the submission of his cause to the trial court.

Respectfully submitted,

EDWARD J. WHITE,
Counsel for Plaintiff in Error.

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CLERK OF SUPREME COURT

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
McGREW COAL COMPANY,
Defendant in Error.

No. 265.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

MOTION OF APPELLANT TO HOLD CASE IN ABEYANCE UNTIL AFTER THE DECISION BY THE INTERSTATE COMMERCE COMMISSION OF THE QUESTION AS TO WHETHER SECTION 12 OF ARTICLE XII OF THE CONSTITUTION OF MISSOURI IS UNJUSTLY DISCRIMINATORY AGAINST STATE OR INTERSTATE COMMERCE, OR BOTH, AND AGAINST THIS APPELLANT.

EDWARD J. WHITE,
JAMES F. GREEN,
HENRY G. HASKELL,
Attorneys for Appellant.

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Now comes the appellant in the above-entitled cause and moves the Court to hold the above case in abeyance and defer its decision thereof, in accordance with its practice as illustrated in the cases of Mitchell

Coal Co. v. Pa. R. R., 230 U. S. 267; Southern Railway Co. v. Tift, 206 U. S. 434-437-439; s. c. 123 Fed. 796; Prentis v. Atlantic Coast Line, 211 U. S., l. c. 232; until after the Interstate Commerce Commission shall have decided the question as to whether or not Section 12 of Article XII of the Constitution of the State of Missouri, on which the cause of action herein is predicated, is unjustly discriminatory against state or interstate commerce, or both, and against this appellant, in a proceeding now pending before it, which was instituted by appellant on the 2nd day of April, 1921 (copy of complaint in which is hereto attached), and which question is primarily one for its consideration, inasmuch as it has exclusive jurisdiction of questions of rate discriminations, as frequently held by this Honorable Court.

Appellant further avers that it has not heretofore instituted such a proceeding before the Interstate Commerce Commission to test the discriminatory character of this constitutional provision, for the reason that, until the amendment by addition of paragraphs 3 and 4 to section 13 of the Act to Regulate Commerce, by the Transportation Act of 1920, it had no right so to do.

EDWARD J. WHITE,
JAMES F. GREEN,
HENRY G. HERBEL,
Attorneys for Appellant.

BEFORE THE

INTERSTATE COMMERCE COMMISSION.

MISSOURI PACIFIC RAILROAD COMPANY, Complainant, vs. THE STATE OF MISSOURI, ARTHUR M. HYDE, its Governor, and JESSE W. BARRETT, its Attorney-General, THE PUBLIC SERVICE COMMISSION OF MISSOURI, and WILLIAM G. BUSBY, NOAH W. SIMPSON, EDWIN J. BEAN, EDWARD FLAD and JOHN A. KURTZ, its Members, and McGREW COAL COMPANY, Defendants.	No. ———

COMPLAINT.

I.

Your petitioner, the Missouri Pacific Railroad Company, respectfully represents and shows that it is a common carrier of freight within the State of Missouri and is engaged in the business of transporting such freight intrastate between points in the State

of Missouri and interstate between points in Missouri and points outside of Missouri and between other states of the United States and is subject to the Interstate Commerce Act, and that this petition is filed by the complainant under the provisions of paragraphs 3 and 4 of section 13 of the Act to Regulate Commerce, as amended by section 416 of the Transportation Act of 1920.

That the defendant Arthur M. Hyde is the duly elected, qualified and acting Governor of the State of Missouri; that the defendant Jesse W. Barrett is the duly elected, qualified and acting Attorney-General of the State of Missouri; that the Public Service Commission of Missouri was created by an Act of the Legislature of said state, approved March 17, 1913, and was thereby empowered to enforce the provisions of said act and other acts; that the defendants William G. Busby, Noah W. Simpson, Edwin J. Bean, Edward Flad and John A. Kurtz are the members of and constitute the Public Service Commission of the State of Missouri; that the defendant McGrew Coal Company, hereinafter for brevity referred to as the Coal Company, is a Missouri corporation which now is and for many years last past has been, engaged in the mining and shipping of bituminous coal from its mines, located adjacent to complainant's rails at Myrick, Mo.

II.

Petitioner further shows that Section 12, Article XII of the Constitution of the State of Missouri, reads as follows:

> "It shall not be lawful in this state for any railway company to charge for freight or passengers a greater amount, for the transportation of the same, for a less distance than the amount charged for any greater distance; and suitable laws shall be passed by the General Assembly to enforce this provision; but excursion and commutation tickets may be used at special rates."

Paragraph 1, of Section 4, of the Act to Regulate Commerce, as amended by the Transportation Act of 1920, reads as follows:

> "That it shall be unlawful for any common carrier, subject to the provisions of this act, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this act, but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive

as great compensation for a shorter as for a longer distance: Provided, That upon application to the Commission such common carrier may, in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may, from time to time, prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but, in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence; And provided further, That rates, fares, or charges existing at the time of the passage of this amendatory act by virtue of orders of the Commission or as to which application has theretofore been filed with the Commission and not yet acted upon, shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the Commission."

That, by virtue of the provisions of said Section 12 of Article XII of the Constitution of the State of Missouri, petitioner is practically compelled to establish a mileage scale of rates for the transportation of bituminous coal over its rails between points wholly within the State of Missouri (or submit to vexatious suits by shippers to recover refunds), notwithstanding the fact that the deposits of such coal are found only in delimited areas in Western Missouri and Eastern Kansas, Northwestern Arkansas and Northeastern Oklahoma and Western Illinois, which fact renders it impractical for shippers of bituminous coal at coal producing points on its rails and those of its competitors in the states of Kansas, Arkansas, Oklahoma and Illinois, where a group or zone system of rates is and for many years last past has been in vogue to compete with the Missouri mines in the sale of such coal in the markets of Missouri, and elsewhere; that the practical effect of a strict compliance with said hard and fast long and short haul provision of the Constitution of Missouri, is to hamper and stifle competition between coal mines located on the rails of complainant and its competitors in the States of Missouri, Kansas, Arkansas, Oklahoma and Illinois and to impede and interrupt the free flow of commerce between said states and produce an undue, unreasonable and unjust discrimination in favor of the owners and shippers of coal in the

State of Missouri against those of the States of Kansas, Arkansas, Oklahoma and Illinois and impose a burden upon interstate commerce in bituminous coal between said states contrary to the provisions of Sections two, three and thirteen of the Act to Regulate Commerce. That this Commission and the Utility Commissions of the various states of the Union have time and again held that coal traffic, because of the delimited areas in which the coal is found, does not naturally lend itself to a mileage scale rate of transportation, but leans rather to a group system of rates.

That, notwithstanding the said constitutional inhibition, the Public Service Commission of Missouri and this Commission have prescribed a scale of rates on the rails of this complainant and its competitors higher in one section of the State of Missouri than in another (Western Advance Rate Case, 37 I C. C. 1; Memphis Southwestern Investigation, 55 I. C. C. 543); that congress, by the passage of paragraph 1 of section 4 of the Act to Regulate Commerce, as amended by the Transportation Act of 1920, hereinbefore quoted which is inconsistent and in conflict with said long and short haul constitutional provision of the State of Missouri, asserted its right to exclusively regulate, control and prescribe (through the medium of this Commission), the meas-

ure of the rates to be charged for the transportation of bituminous coal wholly within the State of Missouri, as well as into and out of it.

Your petitioner further says that Sections 29 and 35 of Article II of the Public Service Commission Act of the State of Missouri, approved March 17, 1913, requires all common carriers engaged or participating in the transportation of property between points within the State of Missouri to file with said Commission schedules showing the rates and charges for the transportation of property within the State of Missouri between each point on its route and all points upon the route of any other common carrier whenever a through route and joint rate shall have been established or ordered between any two such points, and forbids all common carriers from engaging or participating in the transportation of property between points within the said state until its schedules of rates, fares and charges shall have been filed and published in accordance with the provisions of the sections aforesaid. That your petitioner, in an attempt to comply with said constitutional declaration during the months of November and December, 1915, filed a revised schedule of mileage rates on bituminous coal which were within the maximum scale prescribed by the Board of Railroad and Warehouse Commissioners of Missouri (the predecessor of the present Public Service Commission of Missouri), whose orders and decisions were continued in full

force and effect by Section 35 of the Act of the Legislature of the State of Missouri creating said Public Service Commission of Missouri, approved March 17, 1913, which schedule of maximum mileage rates was duly suspended by said Public Service Commission of Missouri on the 8th day of November, 1915, in accordance with the powers in it vested and after a full and public hearing had by said Public Utilities Commission on the reasonableness of said schedules so filed with it, as aforesaid, it, on the 27th day of March, 1916, issued a report and order requiring its cancellation for the reasons stated in said report, copy of which is hereto attached and marked "Exhibit A" and made a part of this petition.

That the defendant McGrew Coal Company sells and ships its output over the rails of this complainant and its connections to points within and without the State of Missouri in competition with coal mines in the States of Kansas, Oklahoma, Arkansas and Illinois; that, for many years past, it has, through the medium of the courts, enforced large claims for damage against complainant in the way of refunds for the alleged violation of said long and short haul provision of the Constitution of Missouri and will continue to do so until this Commission declares said constitutional provision to be unduly discriminatory and prejudicial against said interstate commerce and this complainant and to be null and void.

That the complainant has, during the past twenty years, paid judgments to said Coal Company and its predecessor, James C. McGrew, on such claims aggregating $53,000.00; that there is now pending in the Circuit and Supreme Courts of the State of Missouri and the Supreme Court of the United States suits and judgments aggregating $177,237.86, in favor of said Coal Company and against complainant for alleged violation of said constitutional provision; that the effect of the payment of said judgments to said Coal Company in the past and such as complainant may be required to pay in the future was, is and will be to create unjust discriminations against other shippers of bituminous coal into the State of Missouri, inasmuch as said Coal Company is the only shipper of coal in the State of Missouri which has taken advantage of said constitutional provision and deprived and will deprive this complainant of its legitimate revenues by the diversion of coal shipments to the rails of other competing carriers, which it would otherwise receive but for said unjustly discriminatory and prejudicial constitutional provision.

By reason of the irreconcilable conflict and disparity between the hard and fast long and short haul rule of said constitutional provision, and the qualified and sane rule prescribed in the fourth section of the Act to Regulate Commerce, as amended, great discriminations are daily wrought against interstate commerce between the states of Missouri, Kansas,

Oklahoma, Arkansas and Illinois, by the enforcement of said constitutional provision, to the great detriment, disadvantage and prejudice of this complainant in the way of loss of tonnage which would move over its rails instead of those of its competitors, if it were not for the diversion thereof caused by the operation of said unjustly discriminatory constitutional provision of the State of Missouri, as well as against its patrons in the states of Kansas, Oklahoma, Arkansas and Illinois, who are prevented from shipping coal into Missouri and thus compete with said McGrew Coal Company in the sale of coal in the markets of Missouri, in violation of Sections 2, 3, 4 and 13, of the Act to Regulate Commerce, as amended by Section 416 of the Transportation Act of 1920.

Wherefore, your petitioner prays that in order that it may receive revenues to which it is justly entitled under the Transportation Act of 1920, on the transportation of bituminous coal, both within and into and out of the State of Missouri, that the discrimination produced by said Sections 2, 3, 4 and 13 of the Interstate Commerce Act, hereinbefore alleged, be removed; that this Honorable Commission will institute at an early date an investigation with respect to the matters and things herein set forth, and that, after due notice has been given to the State of Missouri, and the authorities thereof, an order be entered declaring Section 12 of Article XII of the Constitution of the State of Missouri to be unjustly dis-

criminatory and unduly and unreasonably prejudicial to this complainant and its patrons, and of no force and effect, and in violation of the constitutional rights of your petitioner (L. & N. R. R. v. Eubank, 184 U. S. 43), and particularly to be in conflict with paragraph 1 of Section 4 of the Act to Regulate Commerce as amended by the Transportation Act of 1920, hereinbefore set forth, and thereby remove the undue, unreasonable and unjust discrimination complained of by your petitioner, and to prescribe the rates fixed by it in its order in **Ex parte 74**, 58 I. C. C. 220 and 302 (being the same rates for both state and interstate application), for all movements of coal from defendant McGrew Coal Company's mines at Myrick, Mo., over the rails of this complainant and its connections, and for such other, further and general relief in the premises as to this Commission may seem right and proper.

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

By EDWARD J. WHITE AND
HENRY G. HERGEL,
Its Attorneys,
Room 1114 Railway Exchange Bldg.,
St. Louis, Mo.

Hearing requested at
St. Louis, Mo.

EXHIBIT "A".

In the Matter of the Suspension and Investigation of Schedules and Tariffs containing new, individual and joint rates and charges covering shipments of coal via the St. Louis, Iron Mountain & Southern Railway and the Missouri Pacific Railway lines and their connections.

Case No. 814.

Submitted February 21, 1916.

Decided March 27, 1916.*

Opinion.

Atkinson, Chairman.

On various dates during the months of November and December, 1915, the St. Louis, Iron Mountain & Southern Railway, and the Missouri Pacific Railway, by their Receiver, B. F. Bush, and by their agent, E. B. Boyd, issued certain tariffs effective November 22, 1915, December 1, 1915, and December 22, 1915, containing a general increase in rates on soft coal between points in the State of Missouri.

On November 8, 1915, the Commission issued its

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*Motion for rehearing overruled April 24, 1916. Pending in Cole County Circuit Court on writ of certiorari.

order suspending the effectiveness of such schedules to and including March 20, 1916, and on March 14, 1916, the Commission issued its order further continuing said suspension to and including September 18, 1916, unless otherwise ordered by the Commission.

At the hearing of this case counsel and traffic representatives of the St. Louis, Iron Mountain & Southern Railway and the Missouri Pacific Railway stated the purpose of the filing of these tariffs was to bring the rates on coal within the State of Missouri into compliance with the decisions of the Supreme Court of Missouri in the cases of McGrew v. Railroad, 230 Mo. 496; McGrew v. Railroad, 177 Mo. 533; McGrew v. Railroad, 258 Mo. 23, and McGrew v. Railroad, 178 S. W. 1179, and to place the rates between all points on the carriers' lines so as to prevent the filing of further suits of that nature. Such representatives further stated that the companies realized that if such rates became effective they might possibly put some of the operators out of business entirely, or, at least, make it very difficult for them to compete with other mines on other roads.

The protestants stated that the advances contained in the suspended issues would cause the closing of their mines on the one hand, while the receiving protestants stated that the advances would cause material discrimination, including the movement of coal from interstate points of origin to destination in Missouri via the producing points on the defendants' lines at lower rates than would apply from such Missouri producing points to the same destination.

The witnesses for the carriers and for the protestants all stated specifically that in their opinion coal

could not be handled upon a mileage schedule, but must be handled upon a zone or blanket basis.

The protestants representing the City of Springfield introduced exhibits showing the average rates from the seven principal mining points serving that city with comparison of rates applicable in other territory similar to the territory here involved. The average rate to Springfield from the seven mines at the present time on lump coal is $1.00. The average proposed rate would be $1.76. The Kansas maximum rate for the same distance is $1.32. The Arkansas maximum rate for the same distances is $1.16. The actual rates applied under the **group** or **blanket basis** in Kansas by the carriers from Pittsburg, Kansas, to seven consuming points is 80 cents.

Like exhibits were filed showing the results to Joplin, Kansas City, and other points.

The making of rates upon coal is one of the most complicated, as well as one of the most difficult, that has to be met by the traffic representatives of the carriers. The commodity itself is competitive, regardless of its point of origin, and it is low in value and offers but slight liability in case of damage in transit. It loads heavily per car, and while often producing apparently low revenue per ton mile, produces a greater revenue per car mile in comparison than many other commodities.

It has been found in actual practice that a **mileage** schedule of rates on coal cannot be successfully applied, but that the so-called **blanket** or **zone system** must be used. At the hearing this fact was admitted to be true by all parties in interest.

The location of coal mines are not subject to the desire of the owner and cannot be provided with ref-

erence to geographical advantages as compared to the market, but they are where nature has located them. Supplying a market like Kansas City, possibly one of the largest in the West, it is found that coal is produced at various distances and, generally speaking, in all directions. If the closest mine to Kansas City is located some forty miles distant and in Kansas, while another mine is located on another road some fifty-two miles distant in Missouri, it naturally follows that the supplying of the market will be met with coal from the closest mine if a **mileage** schedule of rates is adopted, and it would mean that the line handling the coal from the Missouri mine would be deprived of the revenue produced by the handling of that traffic, unless it met the rate of the Kansas company.

It is the general practice of the traffic managers of the carriers, voluntarily in the first place, and in later years the practice of Commissions in regulating rates, to **group** mines located within certain distances of a consuming market, there often being two or three blankets where the field of production is wide in its range.

We shall not attempt to enter upon a discussion of the law as set forth in the McGrew cases, supra. It is sufficient to say that Section 12 of Article XII of the Constitution of this state provides as follows:

> "It shall not be lawful in this state for any railway company to charge for freight or passengers a greater amount, for the transportation of the same, for a less distance than the amount charged for any greater distance; and suitable laws shall be passed by the general assembly to enforce this provision; but excursion and commutation tickets may be issued at special rates."

We have taken the time to examine the Constitutional debates and the reasons set forth for the adoption of the above section of our Constitution. We find that when it was up for consideration on the afternoon of the sixty-first day of the session, the following explanation took place:

> "Mr. Wagner: I would call attention to this section. It says 'It shall not be lawful, in this state, for any railway company to charge for freight or passengers a greater amount for the transportation of the same for a less distance than the amount charged for any greater distance.' It means at a greater rate, I presume, although it does not say it.
>
> "Mr. Priest: No; it does not mean that. I will tell you what it means. Railroads are frequently in the habit of charging more for a less distance for a car than they are for a greater distance, and the idea is that they shall not charge a greater amount for a less distance than they do for a greater distance."

Following the explanation by Mr. Priest, the record shows that said section was adopted. We think it is too plain for argument that under the provisions of this section that a railroad **may charge as great an amount for a less distance as they do for a greater distance.** As stated by Mr. Priest, "**the idea is that they shall not charge a greater amount for a less distance than they do for a greater distance.**" In other words, the Constitution permits a railroad company to charge as much for hauling freight or passengers for a less distance than it does for a greater distance.

For example, we think under this provision of our Constitution a railroad company may charge as much for hauling a carload of coal fifty miles as it charges for hauling another carload one hundred miles, but it cannot charge more for the fifty-mile haul than it does for the one hundred-mile haul.

Section 3185, R. S. Mo. 1909, provides a greater compensation shall not be charged for a shorter than a longer distance in the same direction.

(1) Sections 33 and 34 of the Public Service Commission Law are broad in their scope against discriminations and undue and unreasonable preferences or advantages of all kinds. Whether the Public Service Commission Law repeals Section 3173, R. S. Mo. 1909, presents a serious question which we leave for the courts to pass upon. Also as to whether the clause found in said section 3173, supra, which provides, **"Nor shall any such railroad corporation charge or collect, for the transportation of goods, merchandise or property over any portion of its road, a greater amount as toll or compensation than shall be charged or collected by it for the transportation of similar quantities of the same class of goods, merchandise or property over any other portion of its road of equal distance,"** can stand in the face of Section 12, supra, of our Constitution, which specifically provides a railroad company may charge as much for a less distance as it charges for a greater distance. Obviously, these important questions are of a judicial character for the consideration and determination by the courts.

(2) We have reached the conclusion that to permit the carriers at this time to cancel the voluntary rates that have been built up during the past ten years upon experience and investigation, and return to the maximum schedule prescribed by the Railroad and Warehouse Commission, would bring about a chaotic condition that would result in the loss of many hundreds of thousands of dollars of property and a general discrimination against the producers and consumers of coal in the State of Missouri.

(3) The defendant companies have admitted that they cannot defend the reasonableness of the proposed rates within themselves and the testimony conclusively shows that they cannot be defended when compared to rates existing in surrounding states or interstate rates to Missouri from mines in the adjacent states or from Missouri to consuming points in the adjacent states or when compared to rates voluntarily carried at the present time by any of the other common carriers in the State of Missouri, and it must therefore follow that the carriers have failed to meet the burden established by the Public Service Commission Law of the rates contained in the suspended tariffs. An order requiring their cancellation should issue.

All concur in the result.

Reported in 4 Mo. Pub. Service Corp. Reports, p. 7.

Order.

It appearing that on November 8, 1915, the Commission entered upon an investigation concerning the propriety of the increases and lawfulness of the rates stated in tariffs containing schedules stating new,

individual and joint rates and charges designated and to become effective as follows:

St. Louis, Iron Mountain & Southern Railway
by B. F. Bush, Receiver.
Missouri Pacific Railway.
P. S. C. Mo. No. 437.
P. S. C. Mo. No. 438.
P. S. C. Mo. No. 439.
Effective November 22, 1915.
Supplement No. 1 to P. S. C. Mo. No. 438.
Supplement No. 1 to P. S. C. Mo. No. 439.
Effective December 22, 1915.
E. B. Boyd, Agent.
Supplement No. 48 to P. S. C. Mo. No. 7.
Effective December 1, 1915.

The Commission on November 8, 1915, ordered that the operation of said schedule be suspended until March 20, 1916; and a further suspension of said schedules having been ordered on March 14, 1916, for a period of six months from March 20, 1916, to and including September 18, 1916, unless otherwise ordered by the Commission.

It further appearing that a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

Now, upon the evidence in this case, and after due deliberation, it is

Ordered: 1. That said carriers and receivers, respondents herein, and designated in said schedules, be and they are hereby notified and required to can-

cel, on or before May 1, 1916, the rates stated in said schedules aforesaid, and specified in said orders of suspension.

Ordered: 2. That this order shall take effect on May 1, 1916, and that a certified copy of this order be attached to said schedules on file with this Commission, and that the secretary of the Commission forthwith serve on said carriers and their receiver, respondents herein, a certified copy of this order and opinion herein.

Ordered: 3. That the respondents be and they are hereby required to notify the Commission in the manner required by Section 25 of the Public Service Commission Law, within twenty days after receipt of a certified copy of this order and opinion, whether the terms of this order are accepted and will be obeyed.